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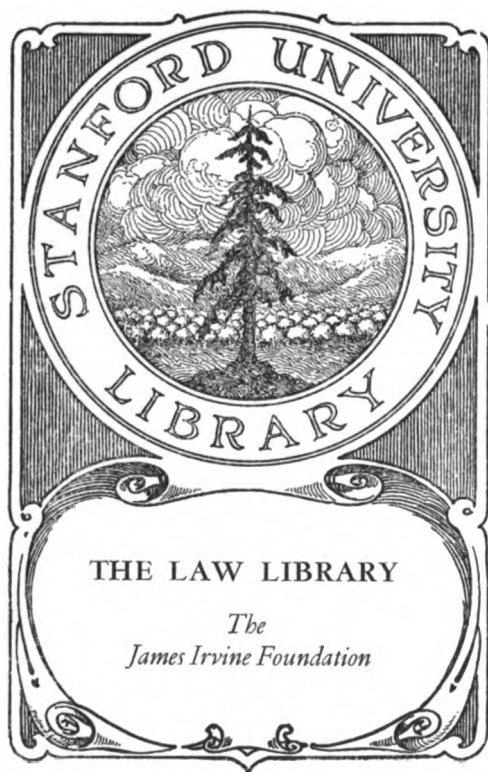
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THE
DECISIONS
OF THE
COURT OF SESSION.

PRINTED
By ALEX. CHAPMAN & Co.
EDINBURGH.

1875

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1877

THE
DECISIONS
OF THE
COURT OF SESSION,

FROM
ITS FIRST INSTITUTION TO THE PRESENT TIME,
DIGESTED UNDER PROPER HEADS,
IN THE FORM OF A DICTIONARY.

IN WHICH ALL THE DECISIONS IN MANUSCRIPT IN THE LIBRARY OF THE
FACULTY OF ADVOCATES ARE PUBLISHED FOR THE FIRST TIME,
AND THOSE FORMERLY PRINTED ARE CORRECTED ;

WITH ADDITIONS IN NOTES,

By WILLIAM MAXWELL MORISON, Esq.
ADVOCATE.

VOL. IV.

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PRINTED FOR BELL & BRADFUTE,
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1802.

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S E C T. XI.

Compensation or Retention, whether good against an *Actio Mandati*.

1672. November 9.

PEARSON *against* SIR ROBERT CRICHTON, *alias* MURRAY.

PEARSON having charged Sir Robert Murray for payment of a bond, he suspends and *alleges* compensation; and that Pearson, having been chamberlain to the late Earl of Annandale in Ireland, and after his decease, being continued by Sir Robert, to whom the Earl, according to the law of Ireland, had disposed his estate by testament for payment of his debt, that the charger had intromitted with certain rents of these lands, which he referred to his oath, and craved compensation; who deponed and acknowledged his intromission, but *alleged* he ought to retain these rents, and have compensation in his own hand, by certain bonds due by the said Earl to John Greg, whereupon he is assignee; and the said Sir Robert being, by the disposition, liable to the Earl's debt, ought to allow the same.—It was *answered*, That these debts were not liquid by any sentence, and that no chamberlain, nor any other servant or depositary, could take assignation to his constituent's debts, and crave compensation thereupon; because the chamberlain being a servant, the property of his intromission remained in his master, and he could not refuse to deliver the same, whensoever demanded.

THE LORDS found that the chamberlain could not retain or compensate his intromission, by any of his constituent's debts, assigned to him after his intromission.

Fol. Dic. v. 1. p. 163. Stair, v. 2. p. 115.

No 80.

A factor cannot retain or compensate his intromissions, by any of his constituent's debts, assigned to him after his intromissions.

1678. July 24.

MARQUIS of DOUGLAS *against* MR WILLIAM SOMMERVILL.

WILLIAM SOMMERVILL, who had paid true debts without the Marquis's order, and in his compts sought allowance of them; the LORDS refused to allow him these payments by way of compensation, but reserved him action, since it is not properly a compensation between master and chamberlain. This was decided before, between Crichton, &c. (*supra*.)

Fol. Dic. v. 1. p. 162. Fountainball, MS.

No 81.

Found as above.

1744. June 19.

CREDITORS of MR HUGH MURRAY *against* ANDREW CHALMER.

No 82.

When money is put into the hands of a mandatary, to be applied for a certain purpose, the death of the mandant, before the application, entitles the mandatary to retain the money in compensation of debt due to him by the mandant.

HUGH MURRAY advocate, executor nominate by Sir James Rothead's will, confirmed the moveables and executed the testament. In March 1741, being about to leave the town of Edinburgh, and apprehending a demand from Sir James Rothead's next of kin of the balance in his hand, for which they had obtained a decree against him as Sir James's executor, he lodged in the hand of Andrew Chalmer, his clerk and ordinary doer, a sum to answer the said demand, and took from him a declaration in the following terms: ' I Andrew Chalmer, writer in Edinburgh, grant that Mr Hugh Murray advocate, has given me in cash L. 135 Sterling, with which I am to pay the sum he is concerned to pay to the nearest of kin of Sir James Rothead, and to report him their discharge.' The next of kin not having made a demand, the money remained with Chalmer till Mr Murray died insolvent, when his creditors attached the same by a confirmation as executors-creditors. Chalmer brought a multiplepinding, and claimed retention of this sum for relief of certain debts wherein he was cautioner for Mr Murray. The creditors opposed this demand, insisting, in terms of the statute, That compensation is confined to actions of debt, and does not take place in an *actio mandati*; that a person employed as a hand, is limited to act like a hand, by delivering the subject as directed; and that Chalmer can no more withhold Mr Murray's cash from his creditors, than he could from Mr Murray himself. Chalmer on the other hand admitted, That being employed only as a hand, it became his duty to pay the sum to Sir James Rothead's executors, or to redeliver the same to Mr Murray himself, if demanded; and that in either of these cases he had no ground of compensation or retention. But he insisted, That the case was altered by Mr Murray's death, which put an end to the mandate; after which he, Chalmer, could not lawfully pay the money to Sir James's next of kin, which therefore remained in his hand as a proper debt due to Mr Murray's representatives, subjected to compensation and retention.

The creditors acknowledged the madate to be so far at an end by Mr Murray's death, that Chalmer could not lawfully thereafter pay the money to Sir James's next of kin; but insisted, That one branch of the mandate remained entire, which is, to redeliver the money to Mr Murray's representatives. They put the case, that Mr Murray, finding use for the money, had changed his mind, and recalled the commission; Chalmer must instantly have restored the money, and would not have been allowed to retain the same upon any ground whatever; and yet, by alteration of will, the mandate was as much at an end as it could be by Mr Murray's death.

Chalmer answered, That there is a wide difference betwixt the putting an end to the mandate by Mr Murray's death and by his alteration of will; that, during Mr Murray's life, there were no *termini habiles* for compensation or reten-

tion, in respect that Chalmer, if he did not restore the money to his constituent, stood bound to pay it to Sir James Rothead's next of kin; but that Mr Murray's death having put an end to the latter branch of the obligation, nothing remained but a simple claim of restitution, which may be subjected to compensation or retention; and he added, that the same exception would have been competent against Mr Murray himself, had Sir James's executor's been *aliunde* satisfied of their claim against Mr Murray.

' Found, That the contract betwixt Mr Hugh Murray and Andrew Chalmer, was a mandate which expired and became ineffectual by Mr Murray's death; and that thereby Andrew Chalmer was in the common case of one having his debtor's money in his hand, for which he was obliged to account; and that therefore retention is competent to him until he be relieved of his cautionary engagements.'

Fol. Dic. v. 3. p. 149. Rem. Dec. v. 2. No 54. p. 82.

1783. July 4. LESLIE and THOMSON *against* DAVID LINN.

LESLIE and THOMSON, insurance-brokers in Edinburgh, were employed by M'Lean, a merchant in Leith, to get insurance on a ship done for him at Glasgow. The brokers, in effecting this insurance, had the policy taken out in their own names. Accordingly, a loss having happened, one of the underwriters granted his bill for his share, in favour of Leslie and Thomson. This bill, however, was by him transmitted to M'Lean, who had previously got the policy into his custody; upon which M'Lean indorsed and delivered it to Linn.

Leslie and Thomson insisted for delivery of the bill to them, on this ground, That M'Lean having been previously indebted to them, they, with a view to avail themselves of the possession of the policy, for operating their payment in the event of a loss, had accepted the commission from M'Lean; and, for their further security, had the policy made out in the above manner. In a process of multiplepoinding, appearance having been made for Linn, they, in support of this claim,

Pleaded; The bill in question being payable to them, and not to M'Lean, the indorsation in favour of Linn by the latter, cannot confer the special privileges competent to indorsees of bills of exchange. Linn, therefore, in this competition, stands on the same footing as M'Lean himself would have done; and the question is, which of the parties has right to the contents of the bill, as the insured value, in part, payable by the underwriters.

An insurance-broker is to be considered as a factor acting on commission; and as it is established, that a factor is entitled to retention of the subject of his factory, for satisfaction of debts due to himself by his constituent, so it is lawful for an insurance-broker to retain possession of the policy for security or pay-

No 82.

No 83.

An insurance-broker found entitled to retain a sum received for a loss, in payment of a debt due by the assured to the broker.

No 83. ment of debt owing to him by the party on whose commission he acts. This rule is founded on the practice of merchants, and in England has been exemplified by a judgment of the Court of King's Bench, in February 1778; *Godin versus* London Assurance Company; Burrow's Reports, v. 1. p. 490. In this particular case, the policy was made out in the names of Leslie and Thomson; and therefore, though M'Lean actually got it into his custody, the effect respecting the latter, is the same as if it had still remained in the possession of the former.

Answered; As to the power of retention competent to a factor, it is not disputed. But an insurance-broker, acting in his proper sphere, is not a factor. If, indeed, the insured, besides commissioning him to make the insurance, which is his peculiar office, were further specially to authorise him to retain the policy; and in the event of a loss, to recover the sums underwritten, then he might so far assume the character of factor, and plead the privileges of such. But whilst his employment is not thus extended beyond its proper limits, his commission is strictly confined to the effecting of the insurance, by making the bargain with the underwriters; upon doing which, it is his duty instantly to deliver up the policy to his employer, who may have immediate occasion for it, as in the event of his transferring the cargo so insured to a purchaser. As for the policy in this case being framed in the name of the insurance-brokers, that circumstance must pass for nothing, as being unauthorised by M'Lean.

THE LORD ORDINARY 'preferred David Linn to the principal sum, and interest contained in, and due by, the accepted bill produced.'

THE COURT, however, altered that interlocutor, and preferred Leslie and Thomson. *See* INSURANCE.—FACTOR.

Lord Ordinary, *Ankerville*. For Leslie and Thomson, *Blair*. For Linn, *Wight*. Clerk, *Home*.
S. *Fol. Dic. v. 3. p. 149. Fac. Col. No 110. p. 173.*

SECT. XII.

Whether good against an *Actio Depositi*.

1697. February 23.

SIR FRANCIS SCOT of Thirlestane, and JAMES SCOT of Bristo, *against* SCOT of Hartwood-myres.

No 84.
A party obtained assignation to an adjudication, and gave back-

ARNISTON reported Sir Francis Scot of Thirlestane, and James Scot of Bristo, who had led an adjudication against Scot of Hartwood-myres, for debts owing

to himself; and likewise on bonds due to James Scot of Bowhill, and others, to whom he gave back-bonds declaring the trust, and obliging himself to hold compt, reckoning, and payment for what he should recover, or denude. Bowhill having assigned Sir Francis to Bristo's back-bond, and he craving him to denude; he *alleged*, upon compensation, that Bowhill was owing him as much by clear liquid bonds, and which he advanced him on the faith of the trust he had of Hartwood-myres' adjudication, and that he would retain till he were paid.—*Answered* for Sir Francis, *imo*, This is not liquid, neither being *inter eosdem*, nor a compensible sum, but only an obligation to denude, which is the prestation of a fact.—*Replied*, That it was an alternative obligation, either to pay or denude, in all which cases *electio est debitoris*; and if he elect to pay, then compensation is in construction of law equivalent thereto. Yet the LORDS considered this was a trust, and that *reddere depositum*, was *juris gentium*, and compensation was neither competent nor receiveable against a *depositum*; and Sir Francis being an assignee for an onerous cause, they repelled the compensation in so far as proponed on Bowhill's debts against him. Yet Bowhill's discharge would have precluded Sir Francis; and it has been oft found, that back-bonds qualify and affect not only personal rights, but even apprisings and other real rights, till either infeftment be taken upon them, or the legal be. expired; and even against singular successors and third parties, whereof there is an eminent case, 5th February 1678, Mr Rory M'Kenzie against Watson. See PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 1. p. 164. Fountainball, v. 1. p. 770.

1709. July 16.

The EXECUTORS-CREDITORS of JOHN STUART, Merchant in Edinburgh, against MR ROBERT STUART, Professor of Philosophy in the College of Edinburgh.

JAMES STUART advocate, one of the town clerks of Edinburgh, having, before his decease in January 1704, disposed and made over all his means and effects in trust to Sir James Stuart of Goodtrees his uncle, and Sir Hugh Cunninghame of Craigend his father-in-law, for the ends mentioned in the disposition; with a clause ordaining what remained of his estate, after payment of his debts and legacies, to be made furthcoming to his two brothers, John and Robert Stuarts, equally betwixt them; and John Stuart chancing to die a little after James, before the trustees had executed his will; they, the trustees, the 25th March 1705, ordered L. 6029, the superplus balance of James's free gear, to be put in Mr Robert's hands, to be kept and made furthcoming by him, to such as should be found to have best right. John Stuart's creditors confirmed his share of the money as executors-creditors to him, and pursued Mr Robert for payment.

No 84.

bond to pay or denude. He attempted to retain till paid a debt due to him by the cedent. Being a trust, or deposit, compensation found not competent or receiveable.

No 85.

A legacy being left to two brothers, the share of one them who had died, was deposited in the hands of the other. Found, that he could not retain for a debt due to himself, in competition with other creditors of the defunct.

No 85.

Alleged for the defender ; He being creditor to his brother John in a liquid bond of L. 730 of principal, and some bygone annualrents, ought to have retention in his own hands for his payment ; especially considering, that the share of James Stuart's estate falling to his brother John, was never *in bonis* of John, but in the person of the trustees, who had the absolute disposal thereof after John's death, and were only liable to an action of trust at the instance of his creditors or representatives. And these trustees having put the money in the defender's hands, to be furthcoming to John's creditors, he might justly pay himself in the first place, by virtue of the delegation ; as well as the trustees might have immediately paid the creditors with the money, as far as it would go, without necessity of confirmation.

Replied for the pursuers ; Their debtor's share of his brother's means, was *in bonis* of the debtor, at his decease, and not then in the defender's hands ; so that whatever way thereafter he attained possession, he could not retain for his own payment, without establishing a title, by confirming himself executor-creditor. Creditors cannot, by any indirect means, prefer themselves to other creditors, doing diligence after the common debtor's decease, 8th February 1662, Crawford *contra* Earl of Murray, No 63. p. 1613. ; and 14th February 1662, the Children of Mouswell *contra* Laurie, No 64. p. 2614. And the trustees could not transmit any title to John Stuart's effects, from whom they had no trust or powers to pay his debt. Besides, whether the right of John's share was *in bonis ejus*, or in the person of the trustees, they could never evacuate the trust, by giving his share, after his death, to any person wanting a title.

Duplied for the defender ; Creditors cannot, indeed, by indirect means prefer themselves to others, and it is certainly a most indirect method, for a debtor to take an assignation to his deceased creditor's debts, in order to compensate against the defunct's other creditors doing diligence, which is the case of the cited decisions ; seeing this course would open a door to any creditor to operate his own preference, by colluding with a debtor. But here there is no such practice ; on the contrary, the defender got the money fairly in his hands by the trustees, who had the only right thereto, and did truly apply it for the use they received it ; 2dly, Suppose John Stuart had lodged in Mr Robert's hands, a sum to be expended by him, in paying John's creditors, is it to be imagined that Mr Robert could not in that case have paid himself, after the debtor's decease, without confirmation ? seeing, *qui suum recipit, conditione non tenetur* ; much more must retention be allowed in this case, where in effect the money was never *in bonis defuncti*, but the trust flowed from others. Again, as, had the money been put by the trustees in Mr Robert's hand, while John was alive, he, Mr Robert, would have good right of retention ; so he must be allowed the like *jus retentionis* against John's executors-creditors.

Triplied for the pursuers ; The disparity is manifest ; for putting the money in Mr Robert's hand in John's lifetime, would, *ipso facto*, have made an ex-

tinguishing *concursum debiti et crediti*, which could not happen by his getting the money after John's decease, which nothing but a legally established title could effect.

THE LORDS found, That Mr Robert Stuart had no right of retention for his own payment; and that the Creditors of John Stuart ought to be preferred to his share of the deposited money, according to the diligence used by them to affect the same.

Fol. Dic. v. 1. p. 164. Forbes, p. 348.

No 85.

S E C T. XIII.

Real and Personal Rights, Whether Mutually Compensable.

1611. March 23.

BUCHAN *against* SEATON.

IN an action betwixt Christian Buchan and Marion Seaton, anent the violent profits within burgh, THE LORDS admitted an exception of compensation against the wife for an annualrent, disposed furth of the same land by her and her umquhil husband.

The like betwixt William Napier and M'Murray.

Kerse, MS. Fol. 245.

No 86.

No 87.

A liquid sum for a house mail cannot be suspended upon compensation, founded upon the tenant's right of retention of any annualrent wherein he is infest furth of the tenement, he having no decree for poinding the ground, nor personal liquid decree against the heritor or liferenter.

1611. June 4.

AGNES HAMILTON *against* WILLIAM M'CARTENEY.

A liquidated decree for a house-mail cannot be suspended by compensation founded upon the tenant's right of retention of an annualrent, wherein he is infest furth of the tenement; he having no decree for poinding of the ground, nor personal liquid decree against the heritor or liferenter.

Fol. Dic. v. 1. p. 165; Haddington, MS. No 2192.

1629. March 25.

E. BUCCLEUGH *against* YOUNG and KER.

THE Earl of Buccleugh pursuing redemption against Young, who had a redeemable wadset of him, mentioned, *voce* REDEMPTION; and in this redemption, one Ker, who was creditor to Young the wadsetter, had, for sums owing to him by the said Young, comprised the said Young's right of wadset and infestment, and who upon that comprising, had charged the Earl to enter him,

No 88.

A reverser having consigned the wadset sum upon an order of redemp-

No 88.
tion, the same was decerned to be delivered up to an appriser of the wadset lands, and was found not compensated by a separate liquid claim, owing by the wadsetter to the reverser; and that, because no compensation can be betwixt an heritable right and a moveable sum.

and by virtue thereof compearing, and desiring that the consigned money, whereupon the lands wadset were redeemable, might be delivered to him; and the Earl *alleging*, That he ought to have right thereto, in respect that Young the wadsetter, before Ker's comprising, was decerned to pay to the Earl certain sums of money, wherein he was his debtor, so that he might compensate therewith, and might therefore take up the money consigned for the redemption; and the compriser *answering*, That seeing the comprising gave him right to the wadset, the money whereupon the land was redeemed behoved to pertain to him, and the pursuer could not compensate therewith, for that debt owing to him, the compriser having comprised an heritable right, for eliding whereof, nothing could be obtruded of any moveable debts owing to the redeemer. The LORDS found, that the compriser had the only right to the sum, whereupon reversion was granted, and not the redeemer; for albeit the wadsetter was owing a moveable sum to the redeemer, before the wadsetter's right was comprised, yet seeing the compriser had comprised that right at that same time when the wadset stood, and before any order of redemption used; and seeing the redeemer had done nothing before the comprising, nor yet since the redemption, nor consignation (whereby it might be supposed that the sum became moveable), to make that sum consigned liable, or to affect the same to him for his debt; therefore it was found, that the compriser had right to the sum, the same becoming in the place of the right of wadset comprised, and which was redeemed by the said sum, which being consigned by the redeemer, in the depositar's hands, could not be claimed by the redeemer, to be compensated with, and to be taken up by him and retained; for then there could not be a redemption used by him; so that he was found not to have right thereto, and that the redeemer could not compensate the sum consigned for redemption, with a debt owing to him by the wadsetter, against the said compriser, who was a singular successor, albeit it had been granted that he might have compensated against the wadsetter's self, if he had not been denuded of his right. See No 55. p. 2204.

Act. Nicolson.

Alt. Cheap.

Clerk, Scott.

Fol. Dic. v. 1. p. 164. Durie, p. 441.

1662. February.

LORD WHITEKIRK against EDNEM.

No 89.
Found that an infestment cannot be compensated with a personal debt.

THE Lord Whitekirk, as having right from the deceased Laird of Lugtoun to a wadset upon Ednem, containing a reversion and back-tack; it was *excepted* by Ednem, That Lugtoun, the cedent, was satisfied of a part of the sums, in so far as he did assign a bond made to him by the deceased Lady Ednem, in favours of one Trotter, with warrandice from his own deed; and notwithstanding of the assignation and warrandice, Lugtoun had discharged the old Lady Ednem of a part of the sums, which they instantly verified, and that therefore

this wadset should be declared satisfied *pro tanto*. It was answered, *imo*, *Contra singularem successorem*, a personal debt by way of retention or compensation, cannot take away a real infeftment; which, without a valid renunciation or discharge, cannot so denude the party infeft, as that a singular successor may not acquire the right thereof. *2do*, This ground of compensation is not liquid nor constant, seeing it depends upon an action of warrandice against Lugton's heirs.

THE LORDS repelled the allegiance, in respect of the first answer chiefly.

Fol. Dic. v. 1. p. 164. Gilmour, No 33. p. 25.

No 89.

1666. December.

WILLIAM OLIPHANT *against* HAMILTON.

OLIPHANT pursuing a poinding of the ground upon an annualrent, it was *alleged* absolvitor from the bygoness, before the pursuer's right, because his author was debtor to the defender in a liquid sum equivalent. It was answered, That the pursuer was singular successor, and no personal debt of his authors could infer compensation of a real right against him.

THE LORDS found, that the bygone annualrents were moveable and compensable with any liquid debt of the pursuer's authors.

Fol. Dic. v. 1. p. 164. Stair, v. 1. p. 423.

No 90.

The bygoness of an infeftment of annualrent are moveable, and therefore compensable by any liquid debt of the annualrenter, even against a singular successor in the annualrent right.

1675. June 18.

LEYES *against* FORBES.

COMPENSATION may be proponed upon sums whereupon apprising is led: because apprising is but an accessory security, a *pignus*, and does not absorb the debt.

Fol. Dic. v. 1. p. 164.

No 91.

* * * See The particulars, No 6. p. 286.

1675. November 12.

HOME *against* HOME.

HOME of Plendergaist pursues Home of Linthill, as representing his father, for payment of a debt of his, which was assigned to Patrick Andrew; the pursuit was founded upon a ticket by Linthill's father, bearing, That he had received a bond of L. 1,200, payable to him for the behoof of John Home, within five weeks after the date; and having a cautioner, Linthill cannot produce the bond. The question is, Whether he should be liable for annualrent on this ground, that it was to be presumed, that the bond of L. 1,200 having a cautioner, did bear annualrent, which then was ordinarily insert in bonds.

VOL. VII.

15 K

No 92.

Compensation was not sustained upon a wadset, which contained a clause of requisition; because, until requisition, there was no debt.

No 92.

THE LORDS found that the presumption was not sufficient to infer annualrent, seeing the term of payment was within five weeks.

All the parties and witnesses were dead, and Linthill was examined, whether he knew that the bond bore annualrent, which he denied. There was also compensation proponed upon an apprising led against Colonel Home, to which Linthill was assignee, and upon a wadset.

THE LORDS sustained the compensation upon the apprising for the principal sum and annualrent; but in respect the ground of it was one of the bonds given by the friends of the Earl of Home, for purchasing a right of teinds, whereof Linthill was one, and got the disposition in his name; therefore the LORDS allowed no further Sheriff-fee nor penalty than Linthill should depone he gave out. They did also refuse to sustain compensation upon the wadset, if it contained a clause of requisition, unless requisition were made, as not being liquid.

Fol. Dic. v. 1. p. 164. Stair, v. 2. p. 368.

1676. June 22.

— against SHEIL.

No 93.

A comprising was deduced at the instance of an assignee, against the representatives of a debtor. Pleaded, the cedent was debtor to the defunct. Objected, compensation is only of personal rights, and not receivable in cases of real right. Not decided.

A comprising being deduced at the instance of an assignee, against the representative of the debtor as lawfully charged; and the comprisinger upon his infetment having intended a pursuit for mails and duties;

It was *alleged*, That the cedent was debtor to the defunct, so that the debt due to the defunct, did compense the debt due by him; and the ground of the comprising being satisfied, the comprising is extinguished: Which case being reported to the Lords, they had these points in debate and consideration amongst themselves; viz. 1^{mo}, That compensation is only of personal debts, and of sums of money, *de liquido in liquidum*; but is not receivable in the case of real rights and lands, and pursuits upon the same; seeing in such processes there is no debt craved, but the pursuit is founded upon a real right: And some of the LORDS being inclined to think, that the allegiance is not founded upon compensation, but upon payment or the equivalent, viz. That the cedent *habebat intus*; and in effect, and upon the matter was satisfied, being debtor in as much as was due to him by the defunct; and the LORDS are in use to favour debtors whose lands are comprised; and, in order to extinguish comprising, to sustain process for count and reckoning; and declaring the same to be extinct, not only by intromission but by compensation; others were of the opinion, that though compensation *ipso jure minuit et tollit obligationem*, where it is proponed; yet if the same be not proponed before the decret, whereupon the comprising proceeds, and when both debts are *in finibus* of a personal obligation, the debt contained in the comprising cannot be said to have been paid before the comprising, and after the comprising is deduced it cannot be extinguished but either by intromission within the years of the legal, or by redemption. 2^{do},

Whatever may be pretended as to the cedent, that he could not be in *bona fide* to comprise for a debt due to him, having as much in his hand as would satisfy the same, yet such pretences are not competent against the third person having *bona fide* comprised, or having *jus quæsitum*; as in the case of a horning upon a decret, it could not be obtruded to the donatar, that the debt was satisfied, the obtainer of the decret being debtor to the defender. And if this should be sustained, expired comprisings and infeftments thereupon, being now a most ordinary surety, may be easily subverted, upon pretence that the cedent was debtor, in sums equivalent, to the person against whom the comprising is deduced: And there is a great difference betwixt payment and satisfaction, either by actual payment of the debt, or by intromission with the mails and duties of the lands comprised, which is obvious and easy to be known; and betwixt the pretence of satisfaction by compensation; seeing payment is *exceptio in rem*, and extinguisheth debts as to all effects; and intromission is so notour, that the buyer may and ought to take notice of the same; whereas compensation is but *quasi solutio*, and it has never effect until it be proponed.

That point was also in consideration with the LORDS, Whether compensation can be proponed by any person, but such as has right to the debt? And as to this point, there were different opinions, and some of the LORDS were of the judgment, that any person, having interest to defend against comprisings and pursuits upon the same, might allege they were satisfied in manner foresaid: But others were of the opinion, that no person can pretend to compensate, but he that could discharge the debt, whereupon he would compensate; and consequently must have right to the same: And in the case in question, neither a confirmed testament, containing the debt due to the defunct, nor any right to the same was produced.

The act of Parliament, King Ja. VI. Parl. 12th, cap. 143, being so positive, that compensation is only *de liquido in liquidum*, before the giving of decreets, and never after the giving thereof; some of the LORDS were of opinion, that though the defender had right to the debt due to the defunct, compensation could not be received: But some of the LORDS having desired, that the advising of these points, being so considerable, should be delayed till to-morrow, they were not decided.

Reporter, *Treasurer Depute*.

Clerk, *Gibson*.

Dirleton, No 362. p. 176.

In an infeftment of annualrent according to the new form, where there is both a subsisting personal obligation, and an accessory infeftment in security, compensation was

1682. February.

ARNOT against RANKINE.

IN an action of poiding the ground, at the instance of David Arnot against Rankine of Pettie, THE LORDS found, that compensation founded upon personal bonds, tickets or other obligements, and tacks for payment of tack-duties,

No 95.
not admitted
against a sin-
gular succes-
sor, unless up-
on debts due
by the cedent
before infest-
ment, when
the bond was
merely per-
sonal.

could not be sustained to extinguish an infestment of annualrent against a singular successor.

Fol. Dic. v. 1. p. 164. Sir P. Home, v. 1. No 142.

* * * See this case by Stair, No 11. p. 572.

1682. *March.* The LORD SALINE and his CHILDREN against CALLENDER.

No 96.
The Lords
sustained
compensation
of the sums
in an adjud-
ication, by ex-
trinsic intro-
missions and
debts other-
wise due, as
well as by in-
tromission
with the rents
of the lands, so
as to exting-
uish the ad-
judication,
these debts
existing
before ex-
piring of the
legal of the
adjudication.

WILLIAM STIRLING of Herbertshire, having led an adjudication against James Short, of certain teinds and acres in Stirling, for 3,000 merks; which being disposed to Oliver Murray and ——— Callender, his spouse, whereupon they were infest; and after her husband's decease, she having pursued for mails and duties; and there being compearance made for the Lord Saline and his children, who had likewise an interest in the lands; and, it was *alleged* for them, That the sum whereupon the adjudication was led was satisfied and extinguished by compensation, in so far as William Stirling the defender was debtor to James Short, the Lord Saline and his children their author, in sums equivalent to the sums contained in the adjudication. *Answered*, That albeit intromission with the rents of the lands will extinguish the adjudication, yet extrinsic debts and personal obligations, wherein the adjudgers stood engaged to the defenders or their author, cannot extinguish the adjudication whereupon infestment had followed, especially in prejudice of the pursuer, who is a singular successor: For, as compensation will not be sustained to extinguish an infestment of annualrent or wadset, being heritable rights, except as to the bygone annualrents, as was decided Oliphant against Hamilton, No 90. p. 2633.; and Home of Plendergaist against Home of Lentill, No 92. p. 2633.; unless requisition had been made or the sums made otherwise moveable; so neither ought the same to be sustained to extinguish comprising or adjudication. *Replied*, That comprising and adjudications are extinguished as well by extrinsic grounds of compensation as intromission. The debts and grounds of compensation being existing the time of the leading the adjudication or apprising; and it does not alter the case that infestment followed upon the adjudication, or that the pursuer was a singular successor, seeing the grounds of compensation against Stirling his author were existing before he acquired a right to the comprising; it being a principle in law, *compensatio ipso jure tollit obligationem*; and the reason of law is, because an apprising or adjudication is but a legal diligence for the creditor's farther security before the legal be expired, and does not so alter the nature of the debt, but that it may be extinguished by extrinsic payments or compensation, as well as by intromission with rents of the lands, as was decided, the Laird of Leyes against Forbes of Blacktoun, No 91. p. 2633.; and there is great difference between an infestment of annualrent or wadset, and an apprising or adjudication; for an infestment of annualrent or wadset are in themselves principal rights and securities, and are not considered as sums of money but as heritage, unless requisition be made, or that the sum be otherways made

moveable; whereas a comprising or adjudication being a legal diligence for the creditor's farther security, is considered in law as an accessory right, which does not hinder but that the sum contained in the adjudication may be extinguished by liquid debts existing before the legal be expired; as also the expiring of the legal of apprisings being odious, many things may be allowed to extinguish the sum contained in the adjudication and comprising that will not be allowed in other cases. THE LORDS sustained the reason of compensation by extrinsic intromissions to extinguish the adjudication, being before the expiring of the legal of the adjudication.

No 96.

Fol. Dic. v. f. p. 164. Sir P. Home, v. 1. No 241.

* * Harcarse reports the same case :

EXTRINSIC grounds of compensation, existing during the legal of an apprising, though after the appriser was infest, found to extinguish the apprising, even against singular successors after the compensation existed, just as intromission, or selling, or wadsetting a part of the appraised lands; though real rights, after infestment, are not regularly compensable with personal rights, which are not *ejusdem qualitatis*. But this point was not fully considered.

Harcarse, (COMPRISINGS.) No 272. p. 65.

1682. *March 17.*

BAILLIE against HASLESEDE.

No 97.

INTROMISSION with a debtor's executry sustained to extinguish an apprising of his lands. *Fol. Dic. v. 1. p. 164. Harcarse, (COMPRISINGS.) No 273. p. 65.*

1697. *January 13.*

JAMES DAES of Coldingknows against JOHNSTON of Hilton and MOTHER.

No 98.

I reported James Daes of Coldingknows against Johnston of Hilton, and his mother, for the teind-duties of Huttonhall; out of which Hilton craved allowance and compensation for the sum of 3,650 merks he had paid as cautioner for Wamphray, Mr James's author, in the right of the teinds. *Alleged*, The compensation can only begin after the date of the bond of corroboration given for that debt by Wamphray to Hilton in 1678, wherein the bygone annualrents are accumulate, and Wamphray acknowledges himself then debtor in the sum, which is an evident renunciation and passing from any ground of compensation he then had; for *quorsum* all this security of a corroboration, if the debt was extinct by compensation before granting the same? And it was not Hilton's fault, that the teind-duties lay in his hand; for they were arrested, and he knew not whom to pay to, till he raised a multiple-pounding, and called all the competitors: And compensation is presumed from the tacit acquiescence of parties, but not that they would insensibly moulder away a sum bearing annualrent with one that carried none. *Answered*, The principles of law were clear, that

Found that a moveable bond might compensate and extinguish one heritable, by decree of comprising, but not *contra*, unless it were loosed and made moveable by a requisition or charge.

No 98.

compensation took place, *ipso momento* there came to be a *concursum debiti et crediti* between the parties; and though it cannot be applied, without being sought and proponed, yet how soon it is founded on, it draws back to the time when the two rights came to be together: And the LORDS found it so, that it commenced from the date that Hilton acquired the debt, wherein he was cautioner for Wamphray, and did not begin at the bond of corroboration, which being no innovation of the debt, cuts off no defence of payment, or other defence competent against the bond corroborated, unless it expressly renounced the compensation. THE LORDS also found a moveable debt might compensate, and extinguish an heritable one due by a comprising, but not *e contra*, unless it were loosed and made moveable by a requisition or charge.

Fol. Dic. v. 1. p. 164. Fountainball, v. 1. p. 754.

*** See Keith against Herriot, No 51. p. 2601.

SECT. XIV.

Compensation or Retention not Proponable after Decree.

1626. December 1. VISCOUNT of STORMONT *against* DUNCAN.

No 99.

The Lords refused to admit compensation by way of suspension tho' instantly verified, since it was not proponed before sentence, tho' the suspender had then compared, but proponed it not.

IN a suspension at the instance of the Viscount of Stormont, against a man of Mr Harry Chaip's, wherein the suspender offered compensation to a part of the sum contained in the sentence, which was suspended with a like sum owing to him, by the obtainer of the sentence; and which debt he instantly verified by production of the writ, bearing the debt subscribed by the charger, or by his cedent, before the assignation made to the charger, which was all one; for the Lords are in use to admit compensation *eodem modo* against the assignee, as against the cedent's self; THE LORDS would not admit this compensation by way of suspension, albeit instantly verified; seeing it was not proponed before the obtaining of the decret, which the LORDS found should be then proponed, and was not admissible after sentence; specially the sentence being given against the suspender, at what time it was competent, and should have been proponed, and he compearing then, and then not proponing it. THE LORDS found it not admissible by way of suspension, in respect of the 143d act, 12th Parl. James VI. which prohibits the same to be receeived by way of suspension (as was offered in this case), or by way of reduction. 'I. C. Compensatio admitti potest post sententiam aliquando; nam est regula, quod ea peremptoria, quæ venit ad limitandam sententiam tantum, sed non impugnandam, potest opponentiam post sententiam, videtur etiam post sententiam opponi posse compensationem, ubi non requiritur altior indago, nam ibi actio est instar exceptionis.'

This decision agrees with the act of Parliament; but the same was never observed to my memory before this time; for the LORDS have ever been in use to admit compensation by way of suspension, notwithstanding of this act of Parliament, which while now was not *in viridi observantia*. The like was done January 17th 1632, ——— *contra* ———, where compensation in a suspension was not received, after sentence given against the party compearing, the compensation being then competent before the sentence, and not then proponed. See SUSPENSION.

Act. Chair.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 1. p. 165. Durie, p. 240.

. Spottiswood reports the same case :

IN a suspension raised by the Viscount of Stormont against William Duncan, the LORDS would not sustain compensation, albeit *de liquido in liquidum*, in respect the decret sought to be suspended, was given *in foro contradictorio*, and that compensation being then competent, was not proponed before the giving of the said decret. *Fol. Dic. v. 1. p. 165. Spottiswood, (COMPENSATION.) p. 40.*

1632. February 17.

WALKER against MAINQUHAIR.

IN an action pursued by one Walker against Mainquhair, wherein decret was obtained by the pursuer, the defender raises suspension and craves compensation of a just debt alleged, owing by the pursuer to the defender, which he instantly verified. It was *alleged*, By the act of Parliament, Ja. VI, Parl. 12th, cap. 143, no compensation ought to be allowed after decret; which allegiance the LORDS sustained, in respect of the act of Parliament, although it was thought by many that the act was hardly conceived. *Fol. Dic. v. 1. p. 165. Auchinleck, MS. p. 30.*

No 100.
Found as
above.

1662. June.

THE EARL OF MARSHAL against BRAG.

THE Earl of Marshal obtains a decret in his own court, against his tenant Charles Brag, for payment of a certain quantity of farm; which was suspended upon this reason, That he ought to have compensation of a liquid debt owing by the Earl to him. It was *answered*, That the compensation is not receivable *post sententiam* by the act of Parliament 1592. It was *replied*, That an act of a baron court is not to be repute such a sentence as that act means by; seeing such sentences are only against tenants for their masters' duties, wherein defences consisting *in jure*, are proper to be disputed, neither can tenants have the benefit of advocates in such courts.

No 101.
Compensation received in a suspension of a decree of a baron court.

THE LORDS sustained the compensation by way of suspension.

Fol. Dic. v. 1. p. 165. Gilmour, No 41. p. 31.

1676. July 25.

WRIGHT *against* SHEILL.

No 102.

Compensation not receivable against a decree in absence, unless where made null and turned into a libel.

WILLIAM WRIGHT, as assignee by John Sheill in Carlourie, to several bonds addebted to John Sheill in Leith, obtained decret before the Sheriff of Edinburgh in *anno* 1662, against George Sheill, brother and heir to John Sheill, wherein he appriseth certain tenements in Leith, and now pursues for mails and duties thereof. The defender *alleged*, That he had raised reduction of the Sheriff's decret upon compensation, by a debt due by John Sheill in Carlourie, the pursuer's cedent, to John Sheill in Leith, and takes the same away by compensation, so that the ground of the apprising being extinct, it falls in consequence; likeas, shortly after the apprising decret is obtained, establishing the debt both *active* and *passive*, whereupon compensation is founded, albeit the very concurrence of the two sums *ab initio inter easdem personas* was sufficient for compensation when proponed. The pursuer *answered*, That the allegiance of compensation ought to be repelled, because it was not proponed *ante sententiam*, conform to the act of Parliament 1592, cap. 143. It was *replied*, That that act was only to be understood of decreets *in foro*, against which, by the course of process then allowed, competent and omitted was not relevant against suspensions or reductions; but that whatever was omitted in the first instance, might have been proponed in the second by suspension or reduction, which the foresaid act only obviates as to compensation, that it shall not be received in the second instance, which doth import that compensation is only excluded against a decret *in foro*, unless it be proponed before sentence; but the decret in question is a decret in absence, and accordingly *de consuetudine* compensation hath been ordinarily admitted by way of suspension; and if it were otherways, great inconveniencies would arise, for parties might obtain decreets, stolen through clandestinely by citations at dwelling-houses, carrying away the copies, or against parties out of the country; and in this case, the defender offers to depone upon his oath, that he never knew of the citation whereupon this decret proceeded. The pursuer *duplied*, That he opposed the clear act of Parliament relating to all Judges within the realm, who are to admit compensation by way of exception, but the same is never to be admitted, after the decret is given, by suspension or reduction, nor is there any ground to limit the decret *in foro*, upon pretence of competent and omitted, whereof there is no mention in the statute; and if the decret itself had been *in foro*, nothing then competent was receivable afterward by suspension or reduction, by law or custom ancient or recent; but when the defender was absent in the principal decret, if he compear in the second instance by suspension, and insisted on any reason, one or more, though he succumbed therein, yet he might raise a suspension on other reasons, and the decret of suspension *in foro* did not exclude the same in subsequent suspensions, as competent and omitted in the decret of suspension *in foro*; but if the principal decret was *in foro*, competent

and omitted was always sufficient against any suspension or reduction thereof; and therefore the common course was to be absent in the first decret, and to suspend as oft as particular reasons could be founded on, to the great vexation of the people, and delay of justice, which therefore is well remedied by the late act of regulation, declaring, That whatsoever was competent and omitted against any decret principal, or decret of suspension *in foro*, shall not be received thereafter; and therefore the excluding of compensation *post sententiam* by this statute, is chiefly in relation to decreets in absence, for if the decret was *in foro*, the common exception of competent and omitted, which was always in vigour against the first decret, would have excluded compensation, yea payment itself, and so the statute was needless, unless it had been to exclude compensation against decreets in absence.

No 102.

THE LORDS found that compensation was not receivable against decreets in absence by the foresaid statute, unless the decret were made null, and turned into a libel by improbation of the executions, or by fraudulent and clandestine taking away of the executions, or any other nullity.

Fol. Dic. v. 1. p. 165. Stair, v. 2. p. 456.

1678. February 5.

LOGAN against COURTS.

COURTS having obtained decret before the Magistrates of Aberdeen against Logan, he suspends on compensation, *alleging*, though the decret bears compensation, it bears no mandate, and that the suspender was out of the country at that time.

No 103.
Compensation not receivable against the decret of an inferior court.

THE LORDS found, That the compensation was not relevant *post sententiam*, though the decret had been in absence, unless the decret were annulled by improbation of the executions, or otherwise, in respect the act of Parliament anent compensation allows the same only *ante sententiam*, and not thereafter.

Fol. Dic. v. 1. p. 165. Stair, v. 2. p. 608.

1683. January.

NICOLAS BARCLAY against ALEXANDER CLERK.

A party against whom a decret in absence in his minority, was recovered by an assignee, raised suspension and reduction upon a reason of compensation on a debt due by the cedent; it was *alleged*, That, by act of Parliament, compensation is not receivable after sentence, and the act making no exception of minors, the suspender's omission to propone compensation *debito tempore*, must cut him off from the benefit thereof; as the short prescriptions, where law doth not expressly except minors, such as possessory judgements, creditors not pursuing within three years after the debtor's death, run against minors.

No 104.
Compensation allowed even after decree, when the charger is *vergens ad inopiam*.

No 104.

THE LORDS, in respect the cedent was now absolutely bankrupt, sustained the reason of compensation, proponed after sentence by the minor. See The case following.

Fol. Dic. v. 1. p. 165. Harcase, (COMPENSATION.) No 255. p. 60.

No 105.

A party in a suspension of a decree *in foro*, proponed compensation, which had emerged after the decree; so that here it was not industriously omitted to be proponed *prima instantia, animo protelandi litem*. The Lords, nevertheless, found the statute general, and repelled the compensation.

1697. July 9. JOHN GORDON elder of Fechil *against* CAPTAIN MELVIL.

In a suspension given in by John Gordon elder of Fechil, against Captain Melvil, of a decret *in foro*; one of the reasons was founded on a compensation emergent after the decret; it was acknowledged that any ground of debt standing in his person before the decret could not be obtruded by way of compensation, because it was competent and omitted, and presumed to have been omitted purposely to procure a new delay by suspension; but this was a debt Fechil had purchased an assignation to after the decret, and was not fraudulently omitted and kept up. *Answered*. The act of Parliament discharging compensations to be received in the second instance, makes no distinction when it was acquired; and the buying in of debts is no very favourable thing; and the LORDS have found even compensation unreceivable in the second instance, though the decret was in absence, Wright *contra* Sheill, No 102. p. 264. THE LORDS repelled the compensation, reserving his action thereon against Melvil, as accords; whereby Fechil was at this disadvantage, that he was forced to pay, and Melvil was *vergens ad inopiam*, and so had little hopes of recovering what he now claimed to compensate him with.

Fol. Dic. v. 1. p. 165. Fountainhall, v. 1. p. 784.

1707. March 20.

HUGH CORBET of Hardgray *against* WILLIAM HAMILTON of Wishaw.

No 106.

Compensation being proponed after a decree in absence, the decree being against the party among many others, the Lords found, that a decree in absence against debtors excludes not compensation.

HARDGRAY, as assignee to a decret of the Commissaries of Glasgow, against Wishaw for 400 merks, contained in a ticket granted by him to the deceast William Anderson, Provost of Glasgow, pursued Wishaw for payment.

Alleged for the defender; Absolvitor, because, *1mo*, The decret was in absence, and intrinsically null for being pronounced in vacation time without a dispensation, by a commissary who is not competent to judge in actions above L. 40 Scots, except where the libel is referred to oath, and the ticket was prescribed. *2do*, Compensation upon a bill drawn by Patrick Murray, clerk to the Fishery company upon Provost Anderson for 1200 merks payable to Wishaw, which the Provost, by a letter under his hand to Wishaw, acknowledged and promised to pay.

Replied for the pursuer; Compensation upon the bill and letters cannot be sustained, because both being holograph were prescribed by the elapsing of 20

years before any diligence done thereon. *2do*, A decret having followed upon the ticket; no compensation can be sustained thereafter. *3tio*, There is no compensation in this case, because the bill on Provost Anderson was to have been allowed to him upon producing the possessor's receipt of payment in the first end of what he owed to the company: And Wishaw having neglected for 20 years to present the bill, or to offer a receipt in the terms thereof, Provost Anderson neither did nor could get allowance of the sum in the bill from the company.

Duplied for the defender; The bill and missive letter could not prescribe, because *eo momento* that they did exist, they *ipso jure* extinguished Wishaw's obligation; it being the nature and effect of compensation, to extinguish the concurring debts; and after extinction, it is absurd to talk of prescription by course of time; *2do*, Wishaw had no reason to pursue them upon the accepted bill, for that he knew it compensated by his ticket; but now that he is pursued upon the ticket, he cannot be debarred from proponing compensation upon the bill; because, *quod est temporale in actione, in exceptione est perpetuum*; and in conformity with this brocard, the Lords decided in the cases of Gordon of Park *contra* Hay of Ranis, 1702; and Hay of Lochcoat *contra* Bonhard, 1703, *see* PROCESS; *3tio*, The act of Parliament excluding compensation after sentence, is only to be understood of decreets *in foro*, whereas the decret founded on was in absence, pronounced by a Commissary, who was not a competent judge. Now Wishaw cannot be blamed for not compearing to propone his compensation, where he was not bound to appear; besides, the Lords have sometimes sustained compensation in a suspension, or by way of defence, even after a decret *in foro*, where there was any probable cause for not proponing the same *in prima instantia*, as in the case of Earl of Marshall *contra* Brag, No 101. p. 2639. observed by Gilmour; *4to*, Suppose Provost Anderson had never got allowance of the sum due by him to the Company, what is that to Wishaw, who hath his liquid acceptance and obligation to pay the bill, which, at the very date thereof, did concur with, and extinguish Wishaw's ticket for the equivalent sum? And if the Provost neglected to ask a receipt, (which Wishaw never refused) *sibi imputet*.

Duplied for the pursuer; The act of Parliament doth not distinguish betwixt decreets in absence and decreets *in foro*, in the matter of repelling compensation after sentence; and it had been needless to make any such act concerning decreets *in foro*, which were sufficiently secured by the regulation act concerning competent and omitted; therefore the statute excluding compensation after sentence, should only be understood to relate to decreets in absence, as was decided 25th July 1676, Wright *contra* Shiell, No 102. p. 2640.

THE LORDS repelled the reasons of prescription of the ticket pursued on, in respect of the decret; but found, That the decret being in absence, and against debtors, it doth not exclude the defence of compensation in the second

No 106. instance ; and found, That the compensation being proponed by exception, doth not prescribe ; and therefore sustained the compensation founded on the precept and letter produced, and assoilzied.

Fol. Dic. v. 1. p. 165. Forbes, p. 158.

* * * Fountainhall reports the same case :

HARDGRAY, as having right by progress, pursues Wishaw for payment of 400 merks contained in his ticket to William Anderson in 1673.—*Alleged*, 1mo, It is prescribed by the act of Parliament 1669, being holograph, wanting witnesses, and not pursued for within 20 years after its date.—*Answered*, No prescription, because interrupted by a decret obtained against you before the Commissary of Glasgow within that time.—*Replied*, The decret was null, being *supra vires*, the instructions given to the Commissaries in 1666, limiting their jurisdiction to L. 40 Scots, except where referred to oath.—THE LORDS found this a sufficient interruption to stop prescription.—Then Wishaw *alleged* on compensation, because William Anderson, Hardgray's author, was debtor to him in the like sum of 400 merks, by an accepted precept drawn upon him by Patrick Murray, clerk to the Royal Company of the Fishery, in 1683 ; so at that moment there was *concursus debiti et crediti*, and his 400 merk ticket was extinct.—*Answered*, No compensation can be received now, because it is *post sententiam*, contrary to the act of Parliament 1592, ordaining it to be receiveable only before sentence ; but so it is, there is a decret against Wishaw for his ticket, and though it be in absence, yet even such decreets were found to seclude compensation in the second instance by way of suspension, Wright *contra* Shiell, No 102. p. 2640. ; for *quoad* decreets *in foro* upon compearance, by the articles of regulations 1672, compensation could not be proponed against them, because it was debarred by being competent and omitted.—*Replied*, Where decreets in absence are recovered against one defender, and no others called, there was ground to seclude them from proponing compensation in the second instance ; and yet even in that case, it was admitted, as Gilmour observes, Earl Marshall *contra* Brag, No 101. p. 2639. But there it was in a suspension of a decret in a Baron Court ; whereas, here Wishaw is called among many other debtors, and so might easily be ignorant of it ; and the citations never came to his hand ; and in such a case it were *durissimum* to reject his compensation ; for if he got it not allowed here, he loses the debt for ever, Anderson being dead and broke.—THE LORDS found against such a decret as this, That the compensation was yet receiveable.—Then Hardgray *contended*, This precept by Murray on Anderson, was extinct by the vicennial prescription, being holograph, and without witnesses, and never insisted on within the 20 years.—*Answered*, If Wishaw were pursuing on this accepted precept, Anderson or his assignee might very well reply, it is prescribed ; but when it is proponed by way of exception, to elide their pursuit on this 400 merk ticket, no prescription can be intruded against it,

though after 100 years silence, because I considered it as compensate with my ticket; and it is a rule in law, *quod est temporale*, and prescribeable when pursued, *per viam actionis*, the same is *in exceptione perpetuum*; and was so found in 1703, in the cases betwixt Sir John Gordon of Park and Hay of Ranis; and Hay of Lochcoat *contra* Bonhard, (*see* PROCESS.)—THE LORDS found, it being only founded on by way of defence, it was not prescribed.

Fountainball, v. 2. p. 363.

No 106.

1710. December 5. MR ANDREW NAISMITH *against* ALISON BOWMAN.

By contract of marriage betwixt Mr Andrew Naismith, student of divinity, and Euphame Gilmour, in 1708, Alison Bowman, mother to the said Euphame, engages for L. 80 Scots yearly during her lifetime *ad sustinenda onera matrimonii*. The marriage dissolving by the said Euphame's death, within 15 months, she dying in childbed, he charges Bowman, his mother-in-law, for the said L. 80; who suspends, that she was circumvened and abused, the contract never being read to her; but she was made believe that her obligation was only to subsist during the standing of the marriage. To this, the clause of the contract, being so precise and positive, was opposed; and she offering neither qualifications nor proof to cancel the contract, the letters were found orderly proceeded against her; and she being charged on the decret, suspended of new on this reason, That she had buried her daughter, and debursed all the funeral charges, which exceeded the sum in the decret, and so she behoved to have compensation, it not being presumeable that it was *ex pietate materna*, 1mo, Because a husband is bound to funerate his wife; 2do, *debitor non præsumitur donare*.—*Answered*, This allegiance is *in terminis* contrary to the 143d act, 1592, ordaining compensation *de liquido in liquidum* not to be receiveable after sentence; and so this being competent and omitted, cannot be now proponed; which is founded on that excellent reason, that if debtors were allowed to parcel out their defences, there would never be an end of pleas; 2do, *esto* the debursments were liquidate and proven, (as they are not) he might crave compensation, she being paid by his wife's goods, effects, and cloaths which she intromitted with; but that is not *bujus loci*; 3tio, If it were never so just a claim, she can never lose it in case she live another year; for though it cannot be obtruded against the sum in the decret, yet it will meet when she comes to pay subsequent terms, and then she will get compensation and allowance of it in so far as she instructs.—THE LORDS repelled this compensation now proponed in the second instance, as competent and omitted in the first, but reserved it as accords. There were other allegiances made against him, which the Lords did not regard *hoc loco*, which were, that he had forefaulted any benefit he could claim by his wife's death, in so far as his barbarous and inhuman usage gave occasion thereto, and it was a just rule and principle of the common law, that he who was accessory to his

No 104.
Again found,
that compensation in not
receiveable
after sentence.

No 107.

author's death, *vel causam necis dedit*, or when done by another, and did not prosecute the same, he lost the inheritance; for *nemo debet lucrari ex proprio delicto, et iniquum est ex scelere ditari, cum non debent lucrum consequi ex eo quod poenam potius meretur*.—*Answered*, The accusation is false and calumnious, and if any were unnatural to her, it was her own friends; and it is neither extraordinary nor unusual for a woman to die in childbed; but when they attack him in a criminal process, he will clear and vindicate his innocence.—But the LORDS thought these recriminations wholly extraneous to the present question, and so waved them at this time. *Fol. Dic. v. 1. p. 165. Fountainball, v. 2. p. 603.*

1736. February 18.

M'LARENS against BISSET.

No 108.

A DECREE had been obtained before the Bailie of the Regality of Balhousie, against James Bisset, at the instance of the representatives of Edward M'Laren, deceased, for the amount of a bill.

Bisset had counter claims against the deceased, who had died insolvent; and in an advocacy *pleaded*, That they might still be proponed in compensation, on account of the bankruptcy of M'Laren, and that the decree was only of a regality, which ought not to preclude compensation.

Effect was given to the decree, only upon condition of the puruer finding caution to be law-biding for the counter claims. *See APPENDIX.*

Fol. Dic. v. 1. p. 165. Session Papers in Advocates' Library.

1739. July 20.

ANDERSON against SCHAW.

No 109.

Found in conformity with
No 105. p.
2642.

COMPENSATION not admitted after decree, though this ground of compensation was not in the suspender's person at the time of obtaining the decree, but acquired by him posterior thereto, in respect of the generality of the terms of the statute.

The like was again found, 9th December 1742, William Hogg merchant in Edinburgh, and the other creditors of Robert Paterson merchant in Saltcoats, against Patrick M'Calla merchant in Saltcoats, (*infra.*)

Fol. Dic. v. 1. p. 165. Kilkerran, (COMPENSATION.) No 2. p. 134.

1742. December 9.

CREDITORS of ROBERT PATERSON against PATRICK M'AULAY.

No 110.

Compensation is not
competent

ROBERT PATERTSON having obtained a decreet against M'Aulay for L. 400 Scots, some of his creditors arrested the same in M'Aulay's hands, who, in or-

der to disappoint them, purchased several bills of Paterson's, due to other creditors of his ; upon which M'Aulay raised a multiplepoinding, and suspended the decret ; and having produced several bills accepted by Paterson, and indorsed to him, he proponed compensation thereon, or at least that he should be allowed to retain the money arrested, in respect Paterson was bankrupt, or caution found that he shall be law-biding for the counter claim.

For Paterson's Creditors who had arrested, it was *pleaded*, That the debts now in M'Aulay's person were all purchased since the decret against him, on purpose to found this plea of compensation : That none of the bills had been duly negotiate, and all of them had lain over for upwards of three years, without any diligence done thereon, whereby they had lost all their privileges ; nay, none of all the indorsations bear a date, therefore it should be presumed that M'Aulay had purchased these bills posterior to the arrestments. Were it otherwise, how easy would it be to disappoint creditors who have done legal diligence by arrestment ? And one who finds he is cut out by prior diligence, has no more to do but to indorse his bill to the common debtor, who propones compensation upon it, by which the arresters are excluded. And it would be vain for the arresters to undertake a proof that the indorsation was posterior to the arrestments, since it is done in so private a way. None need be present but the parties, neither are witnesses or date required.

2dly, The decret against M'Aulay was a decret *in foro* ; consequently he cannot now propone compensation in a suspension thereof. See 29th June 1739, Anderson, (*suprà*.)

Lastly, With respect to the plea of retention, unless caution is found, it was *answered*, That supposing Paterson were bankrupt, there would be some reason for M'Aulay's retaining until caution were found, were Paterson himself charging for the debt ; but in a competition with other creditors of Paterson, he cannot have any privilege, but must be looked on as a common creditor of Paterson's, and has it not in his power to exclude the prior diligence of the rest, by purchasing and requiring debts of the charger in order to defeat the arrestments.

Pleaded for Patrick M'Aulay, That blank indorsations are always presumed to be of the same date with the bills, as was determined No 90. p. 1501. Rossie ; so that the presumption of law lies in his favours : And it is surely very affected in the creditors, to maintain that they can have no proof of the real dates of these indorsations, since none is more easy. The creditors are all alive who granted the indorsations. Their oaths are undoubtedly relevant, as is M'Aulay's oath, which the arresters may have if they insist upon it ; so that there is really no danger to creditors, though this privilege is indulged to blank indorsations. Neither has the suspender any occasion to dispute the relevancy of the second point, *scil.* That he cannot propone compensation in the second instance, even where the ground of it emerged after the decret, because he offers instantly to

No 110.
against a
debt, after
decret has
passed for it,
whether the
grounds of
compensation
were
acquired before
or after
the decret.

No 110. pay, upon the creditors finding caution, that Paterson will be law-biding for the counter claim.

It is acknowledged, he could not be bound to pay to Paterson himself (as he is a bankrupt) unless he found caution; and a creditor of his arresting, can be on no better footing. An arrester is in no better situation than an assignee; nay, he seems not to stand upon so good a one. Surely, an arrester is not such a singular successor, as to stand free from exceptions competent against his author. And this privilege competent to the suspender, of retaining the sum in his hands until Paterson the creditor should find caution, was competent against Paterson himself, before the arrestments were laid on; and therefore must be still competent; he cannot be deprived thereof by laying on of the arrestments.

THE LORDS found compensation not competent after decret, and that whether the debts on which it was pleaded, were in his person who pleads it, before the decret, or acquired after it; and remitted to the Lord Ordinary to hear parties on the retention.

Fol. Dic. v. 3. p. 149. C. Home, No 216. p. 358.

1747. February 25.

A. against B.

No 111.

Decided in conformity with No 106. p. 2642.

ON a verbal report of an Ordinary, Whether compensation was competent after decree in absence, following on a summons against one of many debtors? THE LORDS demurred till precedents should be looked out; and a former case being condescended on, wherein the suspender had been admitted to plead compensation, in respect of that speciality that the decree had been taken against the defender called among many other debtors; the COURT judged accordingly, and 'allowed the suspender to propone compensation.'

Fol. Dic. v. 3. p. 149. Kilkerran, (COMPENSATION & RETENTION.) No 2. p. 136.

SECT. XV.

Concursus Debiti et Crediti.

1629. January 20.

ROSS against BUTLER.

No 112.

The creditor of a rebel, cannot plead

N. Ross, donatar to the escheat of David Vauss, pursued Mr George Butler for the farms of the lands of Blawes, 1623, or prices thereof, belonging to the

rebel, and intromitted with by the defender.—*Alleged*, He ought to have retention of the sum of L. 200, addebted to him by the rebel.—*Replied*, No allowance of any debt of the rebel's to meet the donatar with, but only of that horn- ing whereupon the gift proceeded.—THE LORDS would not admit that compensation against the donatar; especially, because of the time of the debtor's intromission with the rebel's corns, the said David Vauss was then rebel, and so he intromitted with that which was the King's, and could not allege he had *jur retentionis* of so much as pertained to the rebel.

Spottiswood, (ESCHEAT.) p. 103.

No 112.
compensation against the donatary, to his single escheat, claiming the value of intromissions had after the rebellion.

1629. June 27.

HAMILTON *against* HAMILTON.

ALISON HAMILTON sells the lands of Bothwellhaugh, to umquhile David Hamilton of Monckton-mains, who obliged her to infest him therein. Two or three years thereafter, David disposes the said lands again to her in wadset, redeemable to her upon a sum. After David's decease, his heir having transferred the first contract in him, he thereafter makes another assignee thereto, who charges Alison to infest him, conform to the contract; and she suspending, that she ought not to give him infestment, except that he grant back again to her the infestment of the wadset redeemable, conform to the second contract; and which, she alleged, the assignee should do and fulfil, as his cedent, seeing the cedent having denuded himself of his right to the assignee, and he being otherwise *non solvendo*, the assignee therefore ought to fulfil.—THE LORDS found this reason ought not to meet the assignee, and ordained the suspender to charge the cedent, seeing these were two different contracts, whereof each one ought to have their own execution; whereas, if these conditions had been contained in the body of one writ, the assignee also ought to have fulfilled the cedent's part. But here it was presumed, by great circumstances, that the last wadset was redeemed, and the sums satisfied; therefore the LORDS were the more moved to reject the reason against the assignee. See MUTUAL CONTRACT.

Clerk, Gibson.

Durie, p. 452.

No 113.
Found, that an assignee was not affected, by obligations, to which his cedent was bound in a separate contract, though regarding the subject assigned.

1631. July 1.

ELLIOT *against* ELLEIS.

THIS same question, (as in Inglis against M'Cubine, *voce* WRIT), occurring the same day again, betwixt Elliot and Elleis, the same decision was followed. And it being further *alleged* by the defender Elliot, who was convened for payment of a sum contained in his ticket, addebted by him to one Elleis, factor in Campvere, at the instance of James Elleis burgess of Edinburgh, assignee

No 114.
A person was pursued for a sum contained in his ticket granted to his factor abroad. He

No 114.

alleged the factor had goods of his in his hands beyond the amount. This plea was repelled, unless he would allege that the goods were sold, and the price in the hands of the factor.

thereto, that the said cedent being the defender's factor, was full-handed with as many wares pertaining to the excipient, as would in price extend to far more than would pay this sum libelled, with which he was content to compensate the sum; THE LORDS repelled the allegiance, and found the same had no relevant ground of compensation, because the defender alleged not, that the factor had sold the goods, and had the prices thereof in his own hand, *quo casu* it being so, the compensation was receivable; but the factor having only the goods to be sold, as occasion might offer, he was only obliged to the defender to compt; so that if the goods were not sold, he could be no further obliged, but to deliver the same to the pursuer again, and that could not compensate the defender's ticket of a liquid sum, to be paid at a precise time contained in the bond.

Clerk, Hay.

Fol. Dic. v. 1. p. 167. Durie, p. 592.

1632. November 27. LAIRD AITKEN'S Daughter against HOME.

No 115.

A sum due to a pupil was not allowed to be compensated by the debtor, with a sum due to him by her father, her administrator.

LAIRD AITKEN's daughter, who had a certain sum of money left to her by her good-dame, and the sum lent to Mr James Home, minister of , with consent of her father, as lawful administrator to her, charges the said Mr James for the sum. He suspends, *alleging*, That her father, who was lawful administrator, was addebted to him in as much as he was charged for; and, since she was a pupil, and could give no discharge, but her father, who was lawful administrator, must receive the money and give discharge for her, and seeing he has as much in his own hands already as might pay his daughter, the suspender ought to have compensation. To which it was *replied* by the pursuer, That the money charged for was the minor's proper money, and not given to her by her father, but by her good-dame; no debt owing by her father could compensate that her debt, which was neither liquid nor *inter eadem personas*. THE LORDS repelled the reason of suspension, and found no compensation.

Auchinleck, MS. p. 30.

1639. March 16. FORSYTH'S Assignee against Captain COUPLAND.

No 116.

Compensation proposed by a debtor against an assignee, was found relevant, upon a debt of the cedent's, purchased by the debtor before the date of assignee's

CAPTAIN COUPLAND being debtor to William Forsyth in 1000 merks, and being charged by William Forsyth's assignee for payment; he suspends upon this reason, that Forsyth was debtor by two bonds to William Ogston in 1000 merks, and 500 merks; the right of which bonds and sums was devolved in the person of the suspender, and he was content to compensate this debt, for which he was charged, with so much of the sums foresaid *pro tanto*, owing by the charger's cedent, against whom, as the compensation would have been relevant to have met himself, so must it be against this assignee. THE LORDS

found this reason of compensation relevant to be received against the assignee, as well as it would have been against the cedent; neither was it respected, that the charger alleged, that the compensation ought not to be admitted, in respect that the suspender was made assignee a year before the obligation libelled, whereby he borrowed this sum, now acclaimed, from the charger's cedent, at which time, if the cedent had been the suspender's true debtor, by no probability would he have granted him a bond of borrowed money, if he then had been debtor of these sums, with which he compensates; for, with what probability can it be supposed, that a creditor will borrow sums from his debtor, before he be paid of the debt owing by him, from whom he borrows. Likeas, the bond bears, 'That the Captain renounces all exceptions of not numerate money, and all other exceptions whatsoever, competent in the contrary;' and this right being then in the Captain's person, when he borrowed the sum libelled, it must be presumed to have been paid. Likeas, before any intimation made by the Captain of his right to these bonds, wherewith he compensates, Forsyth's assignee raised inhibition against the suspender, upon the bond libelled; which allegiance the Lords repelled, and notwithstanding of the same, sustained the reason of compensation, and suspended the letters *simpliciter*.

Fol. Dic. v. i. p. 166. Durie, p. 885.

No 116.
right, but not
intimated to
the cedent
until after the
assignee had
used inhibi-
tion against
the debtor.

1663. January 22.

WALLACE against EDGAR.

In this case, recorded *voce* ASSIGNATION, No 26. p. 837. the decision was the reverse of that of Forsyth against Coupland (*supra*). See No 119. p. 2652. and No 121. p. 2653.

No 117.

1664. February 13.

HODGE against BROWN.

MR ROBERT HODGE pursues Robert Brown, merchant, for certain duties of land in Leith, possessed by the defender belonging to the pursuer. It was *alleged*, That the defender ought to have allowance of certain profitable expenses, wared out by him upon the house. It was *answered*, That the defender possessed the house as succeeding in the vice and place of Andrew Brysson, to whom the pursuer by tack set the houses for a duty simply, without respect to any charges to be wared out by the tacksman; so that what the tacksman built or repaired, it was on his own hazard and charge, there being nothing conditioned therefor. It was *replied*, That the defender was only convened as possessor; and, as possessor, he ought to have allowance of what he profitably bestowed. It was *duplied*, That what he bestowed without warrant of the master, and being in vice of the tacksman, he can be in no better case than the tacks-

No 118.
Compensa-
tion upon a
debt due by
a tacksman
to his sub-
tenant, was
found compe-
tent to be
proponed a-
gainst the
master; com-
pensation be-
ing payment
in law.

No 118.

man, who, during his tack, if he had built never so much, it would have accresced to the heritor, without remedy or recovery of the expenses.

THE LORDS found no allowance should be granted.

In this same process, it was *alleged*, The defender ought to have compensation for such debts as were owing to him by the said Andrew Brysson, setter of the houses to him. It was *answered*, That the pursuer being heritor and master, ought to have his duty fully paid to him, without respect to any debt owing to the defender by Brysson. It was *replied*, That the tacksman being the setter of the houses to the defender, he was the defender's master, to whom, if the defender had made formal payment, he would have been assoilzied; now, compensation is payment by the law, or the equivalent.

THE LORDS allowed compensation, the debt being proven.

Fol. Dic. v. 1. p. 166. Gilmour, No 97. p. 74.

No 119.

Compensation pro-
posed by a debtor
against an assignee
was found not re-
levant upon a
debt of the
cedent's, pur-
chased by the
debtor before
the date of
the assignee's
right, but not
intimated to
the cedent
until he was
denuded by
the assignee's
intimation to
the debtor.

1665. December 12.

FERGUSON *against* MORE.

In the case, Ferguson *contra* More, the LORDS found, That compensation should not be granted against an assignee upon a debt of the cedent assigned to the suspender; unless intimation had been made to the cedent, before the charger's intimation of the assignation made to him by the cedent. See No 116. p. 2650.

Dirleton, No 3. p. 4.

1676. January 18.

CROKAT *against* RAMSAY.

No 120.

Compensation found
relevant against
a gratuitous
assignee, tho'
the liquidation
was after
intimation.

DONALD CROKAT, as assignee by John Donaldson to a bond of L. 400 granted to him by David Ramsay, charges thereon. He suspends on this reason, that the cedent was debtor to him for four years aliment. It was *answered*, *Non relevat*, unless the aliment had been liquidate before intimation of the charger's assignation, but it is now only liquidate by a subsequent decret, and is not receivable against the assignee. It was *replied* for the suspender, That whatever might be pretended of a subsequent liquidation against an assignee for causes onerous, yet this assignation is not for causes onerous, and the cedent, Donaldson, being good-brother to this assignee, the narrative of the assignation will not prove the cause onerous, unless it be proven *aliunde*, and the benefit of assignees their being in better case than the cedent, though he can only pursue as his procurator, is introduced by custom in favours of commerce, where the cause is onerous, but where the assignation is gratuitous, the assignee is in no better case than the cedent, and the cedent's oath will prove against him, and so must a posterior liquidation. *2do*, The assignation being fraudulent betwixt confident persons, to exclude this liquidation, the cedent having nothing, and the assignee knowing of the aliment before the assignation, the same ought to be received against him. *3tio*, The liquidation is only to modify the *quota* due for

the aliment, and is not an alteration of the species, as when victual is turned into money, and therefore is receivable against the assignee.

No 120.

THE LORDS proceeded only upon the first reason, and found, that if the assignation was gratuitous, compensation is competent against the assignee, though the liquidation was posterior to the intimation, and that the narrative of this assignation betwixt good-brothers, did not prove the cause onerous. *See PROOF.*

Fol. Dic. v. 1. p. 167. Stair, v. 2. p. 400.

1676. July 4.

ROLLO *against* BROWNLEY.

JOHN ROLLO as assignee by John Nicol to a bond granted by Alexander Brownley tailor, to Helen Craig, and now belonging to John Nicol her husband *jure mariti*, charges Brownley for payment, and he having presented a bill of suspension, the cause was ordained to be discussed upon the bill. It was *alleged* for Brownley the suspender, *imo*, That the letters ought to be suspended as to the principal sum charged for, because the bond bears annualrent, and so is heritable *quoad fiscum et relictam*, which by the act of Parliament 1661, is extended to the interest of husbands, as well as of relicts, by the Lords' decisions, finding that wives, as they get no benefit by that act, which makes sums bearing annualrent without a clause of infeftment to be so far moveable, that they fall within the executry, which before they did not, yet as to the fisk and relict, they are excluded from the benefit of that act, and as to them such sums remain heritable as before; and therefore, as they have no benefit, they have no detriment, so that sums bearing annualrent fall not under the communion of moveable goods with the husband, or under his *jus mariti*.

No 121.
Found in conformity with
No 117. p.
2651. and No
119. p. 2651.

Which the LORDS sustained, and found that the assignee could have only right to the annualrents. *See HUSBAND and WIFE.*

As to which the suspender *alleged* compensation, because he had obtained assignation to a debt due by Nicol, the charger's cedent, to Alexander Dalglish. The charger *answered*, *Non relevat*, unless the suspender's assignation had been intimate before the intimation of the charger's assignation.

Which the LORDS did also sustain.

Whereupon the suspender *alleged*, That his intimation, and the charger's intimation, though they be of one day, yet the suspender's intimation bears two of the clock in the afternoon, and the charger's intimation bears no hour, and so can instruct no hour prior to the last hour of the day.

Which the LORDS sustained, but allowed the parties to be heard, if the notary should give a new intimation of the charger's assignation, expressing a prior hour, or should instruct the same by the witnesses insert, whether the same was receivable after production of this assignation.

Fol. Dic. v. 1. p. 166. Stair, v. 2. p. 436.

* * * *See* No 54. p. 2603. which seems to be the same case by Dirleton, but without names.

1679. *January 1.*DICKSON *against* EDGAR.

No 122.

The debtor of a rebel taking assignation, and intimating before his escheat be gifted and declared, may compensate against the donatary, but not afterwards.

UMQUHILE Mr Robert Dickson having obtained decret against Wedderly, as assignee by Bruntfield of Nethermaines, and as having apprised from him for the sums therein; the decret was turned into a libel, and Mr George Dickson, as heir to his brother, having transferred the process, did insist upon his brother's apprising, which was found only to extend to the principal sum, and annualrents after the apprising, but not to the annualrents prior to the apprising; for supply whereof, Mr George hath taken a gift of Nethermaines his escheat, and hath obtained general declarator, and insists thereupon, as having right thereby to the annualrent of the apprising. As to which, the LORDS, by their interlocutor the 19th of June 1677, 'Sustained compensation against Mr George, insisting upon his brother's assignation, and upon bonds wherein his name was filled up unwarrantably upon Nethermaines's debts, to whom the blank bonds did belong.' But now Mr George insists as donatar to Nethermaines's escheat, and *alleges*, that compensation was not competent against him as donatar, especially when it is not founded upon a debt due by the rebel to his debtor before the rebellion; for the compensation formerly sustained, and now repeated, was not upon a debt due by the rebel, to the defender's father, who was the rebel's debtor, but upon a debt due by the rebel to the defender's mother's father, so that there was no concurrence *debiti et crediti* in the same persons before the rebellion; and therefore this compensation is no better founded, than if the defender had taken assignation after the rebellion to a debt of the rebel's, therewith to compensate and exclude the donatar, which, if it were sustained, would make gifts of escheat of no effect, nor needed any back-bond to be taken by the exchequer, in favours of the rebel's creditors, who had a far easier way, by agreeing with the rebel's debtors, that thereupon they might compensate the donatar. It is true, if the assignation to the rebel's debt had been intimate before the rebellion, there was there *concursus crediti et debiti, quæ se mutuo tollunt ipso jure*; but, after the rebellion, it could have no effect. It was *answered*, That the donatar was but a legal assignee; and therefore, before intimation or assignation to any debt due by the rebel, might found compensation against the donatar, as well as against another assignee; for all the rebel's creditors, arresting the debts due to the rebel before declarator, and using diligence thereupon, are preferable to the donatar; and it is to the same effect, that a creditor of the rebel's gets payment from the rebel's debtor, and assigns the rebel's debtor to his debt.

THE LORDS found this compensation not competent against the donatar, seeing there was never a concurrence of debit and credit, betwixt the rebel's debtors, and the rebel before the rebellion, but only betwixt the rebel's heir and the rebel, upon a debt not due to his father, who was the rebel's debtor, but to his

mother's father, whereas he is pursued as representing his father, and not his mother's father.

No 122.

Stair, v. 2. p. 662.

* * * Fountainhall reports the same case :

FOUND a debtor of a rebel taking assignation, and intimating before his escheat is gifted and declared, may compensate against the donatar, but not after it.

Fol. Dic. v. 1. p. 166. Fountainhall, MS.

1683. November 22.

MACKBRAIR of Netherwood against SIR ROBERT CRICHTON, and ———
ROMES his Assignees.

MACKBRAIR of Netherwood having inteded against Sir Robert Crichton, and ——— Romes, his assignees, a reduction of a decreet recovered against him, as lawfully charged to enter heir to his father, grandfather, and grandsire, for certain debts resting by each of them ; as also, of the apprising following upon the said decreet ; the reason of reduction was minority and lesion, in so far as might be extended to the father's or grandfather's debts, whom he noways represented ; and that, as to the grandsire's debts, he offered to prove paid, partly by Sir Robert and his assignees intromission with the mails and duties of the lands of Netherwood, wherein his grandsire died last vest and seased, before the deducing of the foresaid comprising of the said lands. It was *alleged*, That the mails and duties could not compensate the debts of the grandsire, because they were *in bonis* of the grandfather and father, who were apparent heirs to the grandsire ; and they were not *in hereditate jacente* ; and that the defender had ground of recompensation upon debts due by the father and grandfather, which would elide and compensate all the mails and duties intromitted with ; and that, by an interlocutor in the same cause, it was found, that the mails and duties uplifted belonged to the executors of the apparent heir, and that they might be compensated with his debt. It was *duplied* for the pursuer, That he opposed a decreet recovered at his instance, as heir to his grandsire, against Sir Robert, for payment of the mails and duties ; and that recompensation was not receivable after sentence.—THE LORDS found, that although the mails and duties were *in bonis* of the intermediate heir, yet the grandsire's debt being stated against the last apparent heir, by the foresaid sentence recovered against Sir Robert, and the comprising subsisting in so far as concerned that debt, they found, that the mails and duties ought to be *primo loco* ascribed in satisfaction of the debt due by the grandsire, who died last infest in the estate, it being *sors durior*, as being the ground of an apprising, whereas the other, due by the grandfather or father, were only personal debts. It was further *alleged*, That Sir Robert's intromis-

No 123.

A claim not liquidated by sentence before apprising, was found not to compensate, to the prejudice of the appriser.

No 123.

sion could not compensate to the prejudice of the assignee, who had deduced the apprising, in regard Sir Robert's intromission was not liquidate by a sentence at the time. It was *answered*, That, before assignation, there was process intended at the pursuer's instance against Sir Robert for mails and duties, so that *res fuit litigiosa*, after which, Sir Robert could not assign his debt to the pursuer's prejudice.—THE LORDS sustained the reply, and found, that it being *res litigiosa* by a citation at the pursuer's instance, whereupon followed the decret for mails and duties, the assignation after the citation, before the sentence, could not prejudice the pursuer. See HEIR APPARENT—INDEFINITE INTROMISSION—LITIGIOUS.

Fol. Dic. v. 1. p. 166. Pres. Falconer, No 68. p. 45.

1697. November 6.

THE CREDITORS of MR WILLIAM CLARK, Advocate, and JOHN KEITH, their Factor, against MR DAVID DEWAR, Advocate.

No 124.

An adjudger infest pursued for mails and duties. Compensation was not sustained to a tenant upon a debt due to him by his master, against whom the adjudication was led.

THE Creditors of Mr William Clark, advocate, and John Keith their factor, pursue Mr David Dewar, advocate, for the sum of 400 merks, as some years rent of a dwelling-house, pertaining to the said Mr William and his creditors, and possessed by the said Mr David; and the libel being referred to his oath, he deponed in these terms, acknowledging the possession and the quota of the mail; but adjected this quality, that he had become cautioner for the said Mr William, to the Faculty of Advocates, for 600 merks he had borrowed from them on bond, and on distress had paid it, and so craved compensation. It was *alleged*, The defence of compensation could not be received, neither by way of quality, nor otherwise; because the creditors standing infest in this tenement on their adjudications, no debt due by Mr William Clark, their debtor, who is denuded in manner foresaid, can compensate, or meet their right to the mails and duties of their own lands. *Answered* for Mr David, That he seeing Mr Clark in possession, was not obliged to know whether he was denuded or not; nor is a tenant bound to go and seek the registers for a creditor's infestment, unless they be interpellated and put *in mala fide* by a citation of mails and duties, or a poinding of the ground, or by an arrestment at the creditor's instance; and compensation is as favourable as *bona fide* payment, which would have liberate and exonerated Mr David if he had paid to Mr William Clark. THE LORDS considered in this case there was a great difference between *bona fide* payment and compensation; for, in the first case, both the favour of tenants and solution sustains the payment, though made to the wrong hand, if there was a probable ground of mistake; but, in compensation, there must be a true creditor as well as a debtor before it can take place; but here Mr William Clark being denuded by the creditor's diligence, perfected by infestment, (though no process was thereon raised against the tenants), Mr Clark ceased to be a true creditor to Mr Dewar for the house rent, and consequently Mr Clark's debt cannot compensate

the same.—THE LORDS repelled the compensation, and preferred the creditors; else bankrupts might easily disappoint their creditors by granting bonds to their tenants, or obligations that they retain their rents till they be paid of such a sum; which ought not to militate against singular successors. Then Mr Dewar's procurators craved the creditors might assign him to their diligences *pro tanto* for his relief.—THE LORDS thought this unreasonable, unless to come in after their whole debts were satisfied and paid, but not to bring him in *pari passu* with themselves.

Fol. Dic. v. 1. p. 166. Fountainball, v. 1. p. 790.

No 124.

1709. February 26.

BOWHILL against JACKSON.

No 125.

AN assignee to a tack pursued the tenant for the rent. The tenant proponed compensation, 1st, That his master owed him a sum *per* bond; 2dly, That he was cautioner for him in another sum, and had engaged himself in hopes of retaining his rent in relief.—THE LORDS found, that the intimation of the assignation interrupted the compensation for the rents which fell due after the intimation, but that there was *concursum debiti et crediti* for the prior years, and compensation applied.

Fol. Dic. v. 1. p. 166.

* * See The particulars No 61. p. 2612.

No 126.

A party assigned a debt to his son-in-law. The debtor suspended on compensation, having acquired right to a debt due by the cedent, The cedent had been denuded, and the assignation intimated, before the suspender acquired right to the ground of compensation. Found, the compensation could not meet the assignee, but without prejudice to reduction on the act 1621.

1711. January 23.

WILLIAM ALISON against JOHN DUNCAN.

JOHN DUNCAN, late Provost in Dundee, being debtor to Robert Christie by bond, Christie assigns it to William Alison, his son-in-law, who charging Duncan, he suspends, and craves compensation, on this ground, that Christie the cedent was owing to Hunter of Baldivie a greater sum, whereunto he has right as executor-creditor confirmed to Hunter. *Answered*, The compensation never met nor concurred betwixt the two, because Christie was denuded by the assignation, and the same duly intimate to Duncan, before he had established the right of the debt due by Christie to Hunter in his person as executor-creditor; so there was never a *concursum debiti et crediti* betwixt Christie and Duncan. It is confessed, if Duncan had purchased the debt due by Christie to Hunter in his person, before Christie assigned Duncan's bond to Alison, or even before it was intimated, then the compensation would have met; but Christie being totally denuded by an intimated assignation before ever Duncan had right by his confirmation to Christie's bond to Hunter, it is impossible that can be a ground of compensation, but only for an action against Christie, and cannot meet his assignee. *Replied*, If the assignation had been for an onerous cause, then it is

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No 126. acknowledged it would have excluded the compensation; but being from a father-in-law to his goodson, it does not prove its own narrative, but is presumed gratuitous, unless the onerous cause were *aliunde* instructed, and so is reducible on the act of Parl. 1621; and as such rights *inter conjunctos* do not debar from the cedent's oath, so neither can they exclude compensation against the cedent, no more than if the assignation had been in trust upon a backbond, as was found, 28th January 1676, Crocket *contra* Ramsay, No 120. p. 2652. *Duplicated, Non refert*, what be the cause of the assignation; for *esto* it were a donation, and duly intimated, before you acquire in a debt of the cedent's, you are no more his debtor but the assignee's, and can never obtrude the cedent's debt purchased in *ex post facto* against him; for that were to elude my assignation; whereas, *factum cuique suum non adversario nocere debet*; and an executor, taking assignation to some of the defunct's debts after his own confirmation, will neither get retention nor compensation thereon against the defunct's other creditors. Next, the assignation, *esto* it were gratuitous, can never be quarrelled, unless they prove the granter was insolvent at the time he gave it, as has been found, 6th March 1632, Garthland *contra* Ker, No 45. p. 915.; 30th June 1675, Clark *contra* Stewart, No 46. p. 917.; 11th December 1679, Creditors of Mouswell, No 60. p. 934.; and 10th November 1680, M.Kell *contra* Jamieson and Wilson, No 47. p. 920. Though some thought it hard to put creditors to expiscate their debtor's means and effects, and whether solvent or not, it was more reasonable that the debtor's relations should lose than they. However, in this cause, the LORDS found the compensation did not meet the assignee, but prejudice of reducing the assignation on the act of Parliament 1621, as accords.

Fol. Dic. v. 1. p. 167. Fountainball, v. 2. p. 629.

No 127.

Compensation of a bond for money borrowed was refused to be sustained to the granters, upon a debt due by the creditor to their pupil, which they had no right to; although they offered to prove, by his oath, that they borrowed the money from him, up-

1711. June 29.

ADAM ELLIOT, Eldest Son to Walter Elliot of Arkletoun, *against* WILLIAM and NICOL ELLIOTS, his Younger Sons.

WILLIAM and NICOL ELLIOTS being charged, at the instance of Adam Elliot, to pay L. 70 Sterling, and annualrent thereof, contained in their bond granted to William Elliot their father, and assigned by him to the charger, they suspended, upon this reason, that they offered to prove, by the charger's oath of knowledge, that they truly borrowed the money charged for upon the account of Margaret Elliot their pupil, and that the cedent was debtor to the pupil in more, which she, now major, was content to apply towards the extinction of that debt.—THE LORDS repelled the allegiance of compensation, in respect no debt due to Margaret Elliot, by the charger's cedent, can meet the suspender's bond, having no relation to Margaret; seeing they have no assignation thereto

from her. The charger is not concerned whose use the money was applied to ; but the suspenders must satisfy their bond to the charger, and seek relief from their pupil as accords.

Fol. Dic. v. 1. p. 167. Forbes, p. 514.

No 127.
on the pupil's
account, who,
now major,
was willing
to apply her
debt to extin-
guish the
bond.

1711. December 28.

WILLIAM FERGUSON of Auchinblain *against* HUGH MUIR of Auchindrain.

HUGH MUIR of Auchindrain being debtor to William Ferguson of Auchinblain in 300 merks by bond, and being charged to pay, he suspends, and craves compensation, on a tack set by him to the charger, of the lands of Craigskean, the tack-duty whereof is owing, and so must compensate. *Answered*, If the suspender had been heritor of the lands set in tack, then the compensation would have met, but you set it only as factor for Robert Baillie, (as the tack itself proves), and so the tack-duty is your constituent's and not yours, which makes that there can be no *concursum debiti et crediti* betwixt you and me ; it being absurd to extinguish my debt with one you have no proper right to. *Replied*, The tack-duty is payable to me *nominatim*, and not to my constituent ; and as I have the sole power to uplift and discharge, so I may compensate ; and as he could charge me to maintain him in the peaceable possession, if he were disturbed, and make me liable for his damages, so *a pari*, as I have the *jus exigendi*, so likewise the *jus compensandi* : All mutual contracts being equally obligatory on both parties ; and therefore *cui competit actio ei multo magis exceptio competit, cum partes rei semper sint favorabiliores*.—THE LORDS considered, that factors and chamberlains have not the property of their constituent's rents, but only the custody thereof as servants ; and that it made no difference in law that he had taken the rent payable to himself, and not to his constituent, seeing his very title of setting it is *qua* factor, and not *proprio jure* ; therefore the LORDS repelled the compensation. See the 9th of November 1672, Pearson *contra* Murray *alias* Creighton, No 80. p. 2625. where a chamberlain may not acquire a debt of his master's to found compensation on ; which is stronger, and farther than this present decision goes.

Fol. Dic. v. 1. p. 166. Fountainball, v. 2. p. 695.

No 128.
A debtor was
charged for
payment of a
liquid sum.
He suspended,
pleading compensa-
tion, upon
rents due by
the charger
for subjects
over which
the suspender
was factor.
The debt not
being due to
him *proprio*
nominatim, com-
pensation
found not pro-
pionable.

* * Forbes reports the same case :

HUGH MUIR having, as factor to Robert Bailie, indweller in Glasgow, set a tack of the lands of Craigskean, to William Ferguson, for a certain tack-duty payable to the said Hugh Muir ; and William Ferguson having charged Hugh Muir for payment of 300 merks of principal, with annualrent and penalty, contained in a bond granted by the latter to the former ; compensation was not

No 128.

sustained against the charger upon the said tack-duty, in respect Hugh Muir was not heritor of the lands set, but only factor, and the constituent could uplift and discharge the tack-duty, albeit payable by the tack to his factor.

Forbes, p. 567.

1733. December 19.

ANNUITANTS OF YORK BUILDINGS COMPANY *against* BUCHAN.

No 129.

Found that a tenant, a creditor of his master, could not retain bygone rents, still *in medio*, in prejudice of a prior infestment of annualrent.

IN a process of mails and duties, at the instance of an annualrenter against the tacksman, the defence, as to the rents falling due before citation, was compensation by an equivalent sum that his master owed him by bond. It was agreed that the tacksman would have been safe had he paid up these rents before citation; and from thence it was *argued* for him, that compensation operates *retro*, which brings the case to the same with actual payment. It was *answered*, That compensation operates not till it be proponed; and, though it might have been proponed against the master, it cannot now be proponed against the annualrenter, after citation in the process of mails and duties; the annualrenter having a real right in the ground, as much as a singular successor in the property.—THE LORDS found, compensation cannot be sustained against a prior infestment for bygone rents, the same being *in medio*. See APPENDIX.

Fol. Dic. v. I. p. 166.

1752. July 30.

JOHN LESLY of Lumquhat *against* WILLIAM HUNTER, Bleacher at Leven.

No 130.

A piece of cloth sent by a weaver to a bleachfield with his name and mark upon it, being the property of a third party, found retainable only for the price of bleaching that piece, and not for the whole cloth sent by the weaver, the proprietor proving that the cloth belonged to him and not to the weaver.

GEORGE and ARCHIBALD ARNOTS, weavers, in spring 1749, sent a parcel of cloth to William Hunter to be whitened; and, when this parcel was whitened, they brought a second parcel of cloth to be whitened also, marked with their names and usual marks; and they promised to pay the prices for whitening both parcels when they got away the second. Upon the faith of this, William Hunter delivered to them the first parcel. Soon after this the Arnots failed in their circumstances, and left the country. John Lesly of Lumquhat claimed two pieces of the second parcel of cloth; and as Hunter refused to deliver them unless he received payment for bleaching both parcels, Mr Lesly brought a process against him before the Justices of Peace for delivery; and, having proved the property of the said two pieces, the Justices 'decerned the defender to deliver to the pursuer the two pieces of cloth, on payment of the price of bleaching the same.'

William Hunter suspended, and *insisted*, That, as the said two pieces were delivered to him as the property of the Arnots, and marked with their name,

and usual marks, he was entitled to retain the same till he was paid the account for bleaching of both parcels of cloth; for it was on account of the second parcel's being impignorated for the price of bleaching both that he delivered up the first parcel; and as possession of moveables presumes property, he was bound to inquire no further, but might reasonably rely on the security of the second parcel; and there was here no *furtum*, or *vitium reale*, in virtue of which Mr Lesly could pretend to seize the cloth from one who held it for so onerous a cause.

Answered for Mr Lesly, That the presumption of the cloth's belonging to the Arnots must yield to the truth, Mr Lesly having proved it to be his property; and it was not in the power of the Arnots to take the property of his cloth from him, or lay a burden thereon without his consent. The Arnots put their names in his cloth without his knowledge; and if they have thereby deceived the suspender, and induced him to give up the first parcel, each piece of which he might have retained till payment of the bleaching thereof, he has himself to blame for trusting them, but that cannot prejudice a third party.

THE LORDS found the letters orderly proceeded.

Act. *Dav. Grenc.*

Alt. *Ju. Erskine.*

Clerk, *Murray.*

B.

Fol. Dic. v. 3. p. 150. Fac. Col. No 33. p. 53.

1754. July 11.

MRS BURROUGHS and her Sisters, *against* SIR ARCHIBALD GRANT.

CAPTAIN BURROUGHS of London married Mary Cartwright, second daughter of Henry Cartwright of the same place. By the marriage-articles it was agreed, that the Lady's fortune, which was L. 1500, with a like sum of the Captain's, making together L. 3000, should be settled in trust; the produce to the husband for life; and, in case the wife should survive him, to her for life; and, in case of no issue, the property of the whole to the survivor.

There having been many dealings between Sir Archibald Grant of Monymusk in Scotland, and Captain Burroughs, in the year 1733 they fitted an account, upon which there appeared a balance of L. 3810:9s. due to Captain Burroughs; in satisfaction of which, the Captain agreed to accept of a bond for L. 2000; and thereupon the parties discharged each other.

Of even date with this discharge, Sir Archibald executed, at London, an heritable bond in the Scots form, for the said sum of L. 2000, upon his estate in Scotland.

Soon thereafter Captain Burroughs executed, at London, an assignment in the Scots form; wherein he acknowledged, that the said Henry Cartwright had made payment to him of certain sums of money; and therefore assigned him the said heritable bond for L. 2000; and thereupon Mr Cartwright was infeft;

No 130.

No 131.
Retention found incompetent against an administrator in England, pursuing in Scotland, for a debt due to the deceased, on account of counter-claims against the deceased.

No 131. but it afterwards appeared, that this assignment was entirely in trust for the use of the marriage above-mentioned.

Sir Archibald Grant and Captain Burroughs continued their dealings together; particularly certain joint concerns in some mine-adventures in Scotland.

Captain Burroughs having died without issue, his wife, who was his executor, proved his will in England, and intromitted with all his effects.

Mr Cartwright being also dead, Mrs Burroughs and her two sisters, as co-heiresses to him, brought an action in the Court of Session in Scotland, against Sir Archibald Grant, for payment of the said bond.

Alleged for Sir Archibald, That the bond having been conveyed by Captain Burroughs to Henry Cartwright, not for value advanced, but only in trust and security for the sum of L. 3000, which Captain Burroughs was obliged to settle in trust for the use of the marriage, the sisters of Mrs Burroughs had no concern in the matter, as co-heiresses to their father; and that Mrs Burroughs having intromitted with her husband's effects, to an extent far beyond the sum of L. 3000, the bond for L. 2000 reverted to be part of Mr Burroughs's estate.

Upon this state of the case, *pleaded* for Sir Archibald, That Mrs Burroughs, as her husband's executor, must be accountable to Sir Archibald, as her husband's creditor, for certain large advancements he had made in relation to the mine-adventures; and her demand must be liable to retention until she account: That this was material justice, and was established both by the civil and Scots laws.

2do, That even supposing this L. 2000 bond were to be considered the proper claim of Mrs Burroughs in her own right; yet it has been found, in many cases, that when an executor sues for a debt due to himself, compensation may be pleaded against him upon sums due to the defender by the deceased, even though such sums were legacy. *See* the cases of 12th November 1628, Williamson against Tweedie, No 62. p. 2613.; and 15th June 1666, Stevenson against Hermishiels, No 65. p. 2615. Such being the case, although it was true that the pursuer could not be brought to an account, in the first instance, in Scotland, yet, when she is suing there, her suit may be properly encountered by reconvention. *See Voet. tit. De Judiciis*, § 78. and White against Skeen, *voce* FORUM COMPETENS.

Replied, among other things, for Mrs Burroughs; That, even upon the supposition that the bond of L. 2000 was assigned in trust for the uses of the marriage, it had now, in terms of the articles, accrued to her by the death of her husband without issue; her demand is therefore under her own right, not as her husband's executor; and therefore cannot be compensated by any debt alleged due by her husband to the defender. *See Voet. tit. De Judiciis*, § 81. et 82. where he limits and explains the doctrine of § 78. saying, *Non etiam adversus omnes actores reconventionem institui posse constat*, &c.; and the cases of Williamson and Stevenson are not parallel.

2d0, An executor in England, who has intermeddled with English assets only, cannot be compelled, even by reconvention, to account in Scotland, where she cannot be properly discharged. In the case of White against Skeen, the administrator in England sued the heir in Scotland, for relief of a debt due by the defunct; which is entirely different from this case; because there the administrator sued not in his own right. Besides, in a case between the Marquis and Marchioness of Annandale, similar to that of Skeen, the House of Peers gave a different decision. See FORUM COMPETENS.

The COURT having desired to see the opinion of counsel learned in the laws of England, upon this last point;

Those for Sir Archibald Grant gave their opinion, That had Sir Archibald given a mortgage over an estate in England, and this suit been brought against him there, he might have brought a bill, in equity, against Mrs Burroughs and her sisters, to discover for what consideration this L. 2000 mortgage was assigned; and also against Mrs Burroughs, to discover how far she was otherwise satisfied of her demand of L. 3000 out of her husband's estate; and thereupon the Court would decree an account with Sir Archibald, and stay proceedings upon the bond: That unless this be allowed to Sir Archibald, when sued in Scotland, justice cannot be done him; for, when he comes to take his remedy against Mrs Burroughs in England, she may be insolvent, and not to be found.

One of the counsel for Mrs Burroughs, a gentleman of the greatest eminence in the law, gave it as his opinion, That if the trust was made out, Sir Archibald might set up his demands on Mr Burroughs against this demand for L. 2000, and so have an account of all dealings between them; and if this account should become necessary incidentally to a question properly before the Court of Session, he did not see why the enquiry might not be made, making all the allowances which would be made in England: He added, that in England, every person who has a claim upon an estate, has a right to call an executor to an account; and no body is bound by what is done in a cause to which he is no party.—The other counsel for Mrs Burroughs was of opinion, That she cannot be compelled by the Court of Session (if that Court proceeds by rules analagous to the course of the Court of Chancery in England) to enter into an account, till proper foundation is laid for the demand by a legal proof of it: That this must be done by a cross-suit; without which he thought it could not be done; but not by reason of the locality of the probate of the will or of the effects.

These opinions being reported to the Court of Session, the case seemed very intricate; and it was said, that Mrs Burroughs not only could not be properly discharged here, but, How could she account here by the law of England? How could she show here what claims were against her in England; or what allowances she was entitled unto by the law there? Or how could she bring her husband's English creditors to account here?

THE LORDS, on the 28th of July 1752, *inter alia*, ' Found it competent to the defender to plead retention to the extent of the annualrents of the bond during

No 131.

Mr Burroughs's life : Found the pursuer Mrs Burroughs, who administrated the effects of the deceased Mr Burroughs her husband, in England, is not bound to account here for her intromissions, in virtue of that administration ; but to the end Sir Archibald Grant may have a competent time to constitute the debts owing him by Mr Burroughs, and bring the pursuer to account for her deceased husband's effects in a proper Court in England, stopt procedure in this action, both for principal and interest, to the 12th November 1754.'

And after hearing a reclaiming petition and answers, wherein the arguments above-mentioned were handled at great length ; and after hearing the Lord Ordinary's report touching certain facts relative to Sir Archibald Grant's accounts with Captain Burroughs, and Captain Burroughs's accounts with Mr Cartwright ;

THE LORDS, *inter alia*, ' Found, that there is no sufficient evidence, that the sum covenanted by the marriage-articles was satisfied in whole or in part by Cartwright's intromissions with Burroughs's effects, further than to the extent of L. 1040 Sterling, applied to the purchase of L. 1000 capital in South-Sea stock ; and found it competent to the defender to plead retention against the bond pursued on to the extent of the annualrents during Mr Burroughs's life ; but found it not competent to the defender to plead retention on account of Mrs Burroughs's being administrator of her husband's effects in England, and of the defender's counter-action against her before this Court, for recovery or allowance of his claim against her deceased husband. *See FORUM COMPETENS.*

Act. R. Craigie, A. Lockhart.

Alt. Lord Advocate, J. Ferguson, A. Macdowal.
Clerk, Forbes.

Fac. Col. No 111. p. 163.

* * * This case was appealed :

The House of Lords ORDERED, That the interlocutors, and parts of interlocutors, complained of by the original appeal (viz. those which found Sir Archibald entitled to plead compensation to the extent of the annualrents which fell due during Mr Burroughs's life) be reversed, and those complained of by the cross-appeal be affirmed.

1773. August 6. JAMES CLARK *against* ISOBEL BUCHANAN.

No 132.

Compensation found not pleadable upon an open account, against which

CLARK brought an action, in 1771, against Isobel Buchanan, as representing her husband, James Muir, surgeon in Glasgow, for payment of a bill of L. 20 Sterling, granted by him to the pursuer, 22d November 1757, payable one month after date.

Against Clark's demand upon this bill, the defender *pleaded* compensation upon an account of medicines and attendance, due to her deceased husband, by Clark and his mother. Clark admitted this account, in so far as respected himself; but in so far as it regarded his mother, whom he represented, he *pleaded*, That it was cut off by the triennial prescription. This account alleged due by the mother, commenced in the 1744, and ended in the 1750.

Observed on the Bench; That it was plainly prescribed before there was a mutual concourse.

THE COURT 'sustained the objection of prescription to the account due by the mother;' and upon a reclaiming bill and answers, 'adhered.'

Act. D. Armstrong.

Alt. Ro. Cullen.

Clerk, Ross.

Fol. Dic. v. 3. p. 150. Fac. Col. No 88. p. 223.

No 132.
the triennial
prescription
had been run,
before the
date of the
bill with
which it was
sought to be
compensated.

1781. December 11.

ROBERT CAMPBELL of Downie, *against* JAMES CAMPBELL of Silvercraigs.

CAMPBELL of Asknish, and Campbell of Silvercraigs, as trustees for Archibald Campbell of Danna, sold the estate of the last, which was burdened with the payment of certain annuities.

Silvercraigs was himself a creditor of Danna, and prevailed upon the purchaser to pay him, and Asknish, the other trustee, that part of the price which he might have retained as the stock corresponding to the annuities. For this, without mention of their character as trustees, they granted to him a bond, obliging themselves and their heirs to indemnify him for these annuities.

On the death of one of the annuitants, Robert Campbell of Downie, likewise a creditor of Danna, laid arrestments in the hands of Asknish and Silvercraigs, the trustees. In a process of multiplepoinding which followed, a competition arose betwixt this arresting creditor and Silvercraigs, who acknowledged, that he was possessed of the whole sum paid to him and Asknish; but *insisted*, That he was entitled to retain the stock of the annuity which had fallen for payment of the debt due to himself; and, in support of this claim,

Pleaded; It is a point *triti juris*, That an arrestee who is likewise a creditor, is entitled to retain payment of his own debt. This privilege obtains in every case; wherein, as in the present, the sum arrested has been lawfully and *bona fide* acquired; Bankton, b. 1. tit. 24. § 35. Nor, on this occasion, can it be precluded by the character of trustee. *Officium nemini debet esse damnosum*. A factor is entitled to a more extensive retention; Erskine, b. 3. tit. 4. § 21.

Answered for the arrester; The sum in question being a deposite in the hands of the trustees, is not a subject of retention; Erskine, b. 3. tit. 4. § 17.

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No 133.
A trustee is
not entitled
to retention
for a debt
due to him-
self.

No 133.

THE COURT adhered to the Lord Ordinary's interlocutor, finding, ' That the sum *in medio* was in Silvercraig's hands merely in the character of one of the trustees of Danna; and that he had no right of retention or preference therein.'

Lord Ordinary, *Monboddie*. For Arresters, *G. Fergusson*. For Trustees, *Rolland*. Clerk, *Menzies*.
S. *Fac. Col. No 12. p. 24.*

1791. *January 27.*The CREDITORS OF HENRY HARPER *against* ANDREW FAULDS.

No 134.

Goods in the hands of an artisan to be manufactured cannot be retained by him for any other debt than that of the expense of his manufacture.

HARPER, a dealer in the linen trade, used to employ Faulds as a bleacher; and at the end of each season accounts were settled between them, for the cloths bleached in the course of it. On one of those occasions Harper granted a bill for L. 105.

In the following season he sent various parcels of linen to this bleachfield, but soon after became bankrupt, his estate being sequestrated, and a trustee chosen over it. The trustee demanded delivery of those goods on payment of the price of bleaching them. This being refused by Faulds, who claimed retention for security of the bill-debt, the trustee brought an action against him, when it was

Pleaded for the defender; One's right of retaining the goods of another; until he shall restore the property of the retainer in his possession, is founded on the first and clearest dictates of justice. It is, however, to be understood, that in the retainer's situation no circumstances have occurred inconsistent with his claim; that his possession is honest and lawful; that he has neither relinquished the claim by express paction; nor is excluded from it by implied compact, as in the cases of deposit and of commodate; nor debarred by any positive law: But if possession has been obtained *hinc inde* in the way of commerce, where, from the nature of the contract, each party is to be entitled to a certain patrimonial benefit, and to make the best advantage he can of his neighbour's property, justice requires that the performance be mutual, while nothing to the contrary is stipulated or implied. And it requires this more especially when, by the insolvency of the party, the denial of retention is the loss of a debt.

Such is the situation of an artist having the goods of other people in his possession for the purpose of manufacture; it being in effect the same, as if he had held that possession for his own benefit, by paying a premium to the owner. This is evident where different artisans have, in that way, mutually each others goods in their custody; in whose case it is clear, at the same time, that there is nothing peculiar.

The above is the doctrine of the Roman law. Without *bonæ fidei* possession, in the case of deposit—or in that of *commodatum*, there existed no right of

retention; *Voet. ad lib.* 16. tit. 2. § 16.; *ad tit. depos. vel. cont.* p. 741.; *l. pen. Cod. lib.* 4. tit. 34.; *Id. ad. tit. Com. vel. cont.* p. 684. But in all transactions affording mutual benefit, or *quid pro quo*, such as *locatio conductio*, the principle of retention had its full operation. Though the convenience of commerce may dictate the limitation of the right, to cases of the insolvency of owners, yet no such distinction was recognized by the Roman law, which allowed it always, even as a *facilius remedium*.

When, in § 32. *ad. tit. de loc. cond.* Voet. argues, that a conductor cannot retain, he means only as claiming the property against the locator; and if, under that title, he speaks solely of retention for sums expended on the subject, it is because this alone could there fall properly under his consideration. Even, in the case of *pignus*, the Romans admitted the right of retention in its fullest extent; allowing the pledge to be retained for extraneous debts, not excepting such as were contracted after delivery; *l. unic. Cod. Etiam ob. cbirog. pec. pen. pig. ten. poss.*; *Perez. Prælect. in Cod. Justin.* Now does it derogate from this right, that the retention could not operate against the *secundus creditor*, or him who had the secondary right of pledge; *Voet. ad tit. Quib. mod. Pig. vel Hyp. solv.* § 15.

Those principles are not less firmly founded in the common law of Scotland, as appears by the best writers; *Stair, b. 1. tit. 18. § 7.*; *Bankton, b. 1. tit. 24. § 34.*; *Ersk. b. 3. tit. 4. § 20.* The act of Parliament of 1592, instead of introducing, modified and limited the pre-existing right of compensation; in the same manner as the immediately subsequent act, relative to expenses of plea, did with regard to that claim. Nor is it any opinion of the authors above cited, that they refer to particular instances of retention, these not being stated as limits, but as examples of the right.

The decisions of the Court still more explicitly announce the same doctrine. In the case of *Menzies contra Irvine*, retention of a sum due by bill was admitted, on account of a cautionary engagement by the debtor for the creditor; in which case the caution was surely not incurred in contemplation of the bill-debt, as the bill would be indorsed away, and retention would not have been pleadable against the indorsee; *Fountainhall, v. 2. p. 657. 10th July 1710, Menzies contra Irvine, No 147. p. 2686.*

In like manner a mandatary, after the death of the mandant, was found entitled to retention of money, for relief of a cautionary obligation for the debts of the latter; 19th June 1744, *Creditors of Murray contra Chalmer, No 82. p. 2626.*

These are palpable instances of the general right of retention, and peculiarly apposite to the case in question. For it is surely not less to be presumed as understood, between a creditor and his debtor who is also cautioner for him, that the debt shall be paid without any claim of retention as cautioner, than that an artist having his employer's goods in his hands to be manufactured, should have agreed to renounce his right of retention for debts, due to him by the employer.

No 134.

The decisions in the cases of *Lees contra Dinwiddie*, No 4. p. 2546. and of *Glendinning contra Montgomery*, No 34. p. 2573, though perhaps erroneous in sustaining an unlawful possession, are nevertheless strong authorities for the right of retention; as was also the judgment of the House of Lords in the case of *Hewit and Brockhurst*, 6th December 1775*. Nor when the *ratio decidendi*, in that of *Leslie contra Hunter*, the very case of a bleacher retaining cloth bleached by him, is attended to, can it be otherwise considered than as a precedent of a similar kind; No 130. p. 2660.

On the same principle alone, rests the acknowledged right of factors to retain the goods of their constituents, in security of all debts whatever due to them by the latter, *see* MUTUAL CONTRACT; *Erskine*, b. 3. tit. 4. § 21. For on any other ground than that of the general right of retention, a factor's claim could extend no farther, than to retain for payment of factor's fee and of disbursements on the subjects. Even the right of retention, called a writer's hypothec, is another proof of this principle.

Nor, in the present case, are the creditors of the bankrupt owner placed in a better situation than he himself would have been. They are evidently in one less favourable; for any idea of an anxiety to exclude the right of retention, can hardly be applied to a party who is bankrupt, and without any personal interest in the matter. The bankrupt statutes surely affect not the right of retention more than that of compensation. If the goods by carelessness had been destroyed, the bankrupt would have been creditor for the price, and compensation must have been sustained. But as they are preserved safe, is the claimant's condition on that account to be rendered worse? And although a fraudulent use might on some occasions be made of retention, this imperfection is nothing but what is common to all commercial transactions; the remedy of which the law will supply when it becomes necessary, as in all cases where devices are employed *fraudem facere legi*; *Blackie contra Robertson*, No 12. p. 887.; *Sym contra Thomson*, No 201. p. 1137. Indeed as a person can neither arrest nor pounce goods in his own hands; to deny the right of retention, would make the situation of one possessing the bankrupt's goods, more unfortunate than that of any other creditor.

Though the law of England is of no proper authority in Scotland, it may be noticed that it supports the doctrine of retention; of which Lord Kames gives an instance in *Princ. of Equity*, b. 11. cap. 3. as occurring in the Court of Chancery. And that the same rules prevail there in the other courts appears from Lord Hardwick's opinion in the case of *Deeze*; *Atkin's Rep.* vol. 1. p. 229. Nor is Lord Mansfield's judgment, in the case of *Green versus Farmer*, different in principle, as is evinced by the reasoning on which it is founded.

Answered: The inexpediency of the defender's doctrine, both to the public in general, and to the individual employer, is obvious; to the public, whom by a latent and unknown security it excludes from access to a debtor's property; and to the employer, who may thus be deprived of the most advantageous use of

* *See* APPENDIX.

goods, which will often depend on having them at command at a particular time.

The privilege of compensation or of retention was not original in the law of any country ; its subsequent introduction, and always under various limitations, having been owing to considerations of equity.

In Rome, so far from being a part of the common law, compensation was only at first admitted *ex æquitate* by the Prætor, in *judiciis bonæ fidei* ; nor was it extended so as to become admissible in *judiciis stricti juris*, prior to the rescript of the Emperor Marcus ; Vinn. ad Instit. p. 811. And in England, it was but in the reign of Geo. II. that compensation of mutual debts, unconnected with each other, was authorised by statute.

That in Scotland, before the statute of 1592, c. 143. compensation was not permitted by way of exception, appears from Balf. Pract. p. 349. ; Stair, b. 1. tit. 18. § 6. This statute speaks of compensation alone, being silent as to retention of *ipsa corpora* ; which owes its introduction to the authority of the Court. But the retention thus authorised is always founded on a mutual contract, and consists in withholding performance on one side, until that on the other be ready to ensue ; See *voce* MUTUAL CONTRACT.

In the case of an artist employed to manufacture goods, the contract that takes place consists in an obligation on the one hand to perform the work and restore the subject, and on the other to pay the hire ; the civil possession remaining all the while with the employer ; Voet. lib. 4. tit. 2. § 1. l. 18. *pr. de adquir. vel amitt. possess.* ; Blackstone, vol. 2. p. 452. ; although the artist may avail himself of his actual custody, till the counter part of the contract be fulfilled. But farther than this, which is a right arising immediately from the contract, the artist has no privilege of retention. For the defender's idea of the right extending as a security for extraneous debts, has no foundation in law.

If there were any ground for so unlimited a claim, it would not be confined to moveables, but would comprehend equally immoveable property. A tenant of a farm, for example, would, in an action of removing, be entitled to defend himself by the same plea, on account of a debt due to him by the landlord. But the law does not recognise any such doctrine ; for even an heritable right to the lands in the person of the tenant would not be sustained as a defence. The maxim of law on this head is, *Nemo potest mutare causam possessionis suæ* ; Voet. lib. 19. tit. 2. § 32. ; See MUTUAL CONTRACT ; Vinn. Select. Quæst. lib. 1. cap. 51.

Again, if such a comprehensive right existed in our law, it would certainly be announced by the writers, and recognised by the decisions. But the reverse is the case, as appears from the various authorities ; where indeed the doctrine of retention is not treated with much accuracy ; Stair, b. 1. tit. 18. § 7. ; Bankton, b. 1. tit. 17. § 15. tit. 24. § 34. ; Erskine, b. 3. tit. 4. § 21. See also *voce* MUTUAL CONTRACT.

No 134.

The case of factors entitled to retention of their constituents' funds, and of the hypothec of writers, mentioned by the defender, do not support his plea. For factors are clearly understood to advance their money in the faith of this security, by which circumstance a virtual contract is formed; and the writer's hypothec has been always confined to claims arising out of his employment, so that it stands in the same predicament. Creditors of Lidderdale *contra* Nae-smith, 5th July 1749, *voce* *HYPOTHEC*; Macvicar *contra* Campbell, 1735, *IBIDEM*; Orme *contra* Barclay, 18th November 1778, *IBIDEM*.

As to the case of cautioners, this affords not a proper instance of retention; for it is the plea of compensation that really belongs to a cautioner, when his creditor lies under the obligation of relief to him.

In the question, Murray *contra* Chalmer, No 82. p. 2626. if the mandate had not fallen by the mandant's death, it was admitted, that the mandatary would have had no right to retain; but on the mandant's death, the money in the mandatary's hands became a debt due to the representatives of the former, against which the latter was entitled to plead compensation.

The case of Hewit and Brockhurst has been misconceived. It did not depend on the supposition of any general right of retention, but altogether on the nature of the special powers conferred on a person concerned.

With regard to the supposed effect of bankruptcy, it is reasonable, that the loss resulting from it should be equally distributed among all the creditors; nor does the circumstance of one of them holding a part of the debtor's property by accident, and without any right of pledge, create a just preference. He is only a custodier for the creditors at large. To say that he would be in a worse condition thus than the rest of the creditors, is a mistake; because in the name of a trustee he could arrest, and in his own he could execute a pouding.

Nor is there any solidity in the distinction between the case of gratuitous loans, and the like, in which the defender admits that retention is excluded, and that of contracts of a commercial nature; for if retention is not founded in the contract, it must be equally against right, whether that be onerous or gratuitous. The distinction receives no countenance from the Roman law, to which he appeals, as is evident from the passages above referred to; *Vid. etiam Voet. lib. 16. tit. 2. § 20. ; lib. 20. tit. 2. § 28.* As to the *lex unica Codicis*, it gave not the right of retention against another creditor, but merely against the debtor himself; *Perezzius, lib. 8. tit. 27. § 3.*

It is last of all to be observed, that the doctrine now maintained by the pursuer is in the law of England perfectly established, as is evident from the case of Green *versus* Farmer, reported by Burrow, vol. 4. p. 2214.; and by Blackstone, vol. 1. p. 651.

The Lord Ordinary reported the cause on informations, when the Court ordered a hearing in presence.

Afterwards, on advising the cause,

The majority of the Court seemed to be of opinion, That although an artist's right of retaining, for security of his hire, the goods on which his labour has been bestowed, be understood as *pars contractus*; yet his possession or custody being only *ad hunc effectum*, it becomes unlawful when stretched beyond these limits; that the proper possession therefore still remains with the owner; of which, it was observed, the competency of pinding goods in that situation for his debts is a farther evidence; and consequently that there is not any room in such a case for the claim of retention.

Some of the Judges observed, That as in this case there had been a continuation from year to year of the same work performed to the owner, so the whole money due might be considered as an individual price for manufacturing one quantity of goods, and therefore that of the former any part might be retained, for whatever was due on account of the latter. And it was said, that the same principles of justice on which as to money compensation was founded, comprehended equally retention in respect of goods, which last would not, from its latency, give any peculiar occasion to fraud; for if this were intended, it could be as easily accomplished by a private agreement; nor would the bankrupt-statutes be less effectual against retention than other modes of security, when unduly attempted.

One Judge, who concurred with the majority as to the possession remaining with the owner, maintained at the same time, that in consequence of the owner's bankruptcy, effect ought to be given to the plea of retention; for that, by this event, the nature of all the contracts subsisting between him and his creditors was changed, and the whole converted into one general count and reckoning, insomuch that any special claim for delivery under a particular contract must have ceased. The same Judge too noticed, that it was because the right of retention was always viewed as an attribute of the various contracts out of which it rose, that it had not been more specifically treated of by writers on law.

THE LORDS 'repelled the plea of retention.'

To this judgment, a reclaiming petition having been preferred and followed with answers, the Court, by a very narrow majority, adhered.

Reporter, Lord Justice-Clerk.

Act. Wight, Cullen.

Alt. Dean of Faculty, Cathcart.

Clerk, Sinclair.

S.

Fol. Dic. v. 3. p. 150. Fac. Col. No 163. p. 328.

1796. January 15.

JOHN DUNLOP, Trustee on the Sequestrated Estate of JAMES DUNLOP, against
The DUNBARTON GLASSWORK COMPANY, and their CREDITORS.

THE affairs of James Dunlop having gone into disorder, his estate was sequestrated in 1793.

No 135.

The creditors of a solvent company can rank on the

No 135.
sequestrated
estate of one
of the part-
ners, who
happens to
be debtor to
the company,
only to the
extent of the
balance due
by him to the
Company,
and not for
the amount
of the debts
due to them-
selves.

Mr Dunlop was at this time a partner of the Dunbarton Glasswork Company ; but it was provided by the contract of copartnery, that, if any of the partners became bankrupt, they should be obliged to withdraw ; and that their interest in the concern should resolve into a claim for their share of the stock at the last balance of the books preceding their bankruptcy.

Mr Dunlop owed the Company a much larger sum than his share of the stock ; over which last, it was admitted the Company had a right of retention, but they had only a personal claim against him for the balance.

The capital of the Company having been inadequate to carry on their business, they had borrowed money to a large extent, chiefly upon bonds, in which all the partners were bound conjunctly and severally.

At Mr Dunlop's bankruptcy, the funds of the Company were more than sufficient to pay all their debts. Most of their creditors, however, in place of demanding their money, accepted corroborative securities : But at the same time they claimed payment from James Dunlop's sequestrated estate ; a step which they seem to have taken by desire of the Company, who probably had it in view to compensate *pro tanto* the claim for reimbursement of the dividends drawn by these creditors, which would, in this way, have arisen to James Dunlop's private estate against the Company, with the balance which he owed them ; by which means they would have drawn full payment of their debt, in place of ranking for it *pari passu* with the other creditors.

The Trustee on James Dunlop's estate gave in objections to the claim of the Company creditors in the usual form, and at the same time brought an action both against them and the Company, concluding, that the latter should be ordained to pay the debt due to the former, or, if they should decline to accept payment, that it should be found they were not entitled to claim on the sequestrated estate ; and

Pleaded ; Although in the case of a bankrupt Company their creditors are entitled to rank on the estates of individual partners, 4th July 1776, Creditors of Carlisle and Company against Creditors of Dunlop, *voce* SOCIETY, they can have no interest or title to do so where they can instantly get payment from the Company, their proper debtor. This, therefore, in reality, is a question not with the Creditors, but with the Company, to whom the former are attempting to create an undue preference.

But if they shall, nevertheless, be allowed to rank, it should at all events be found, that their doing so cannot give the Company any advantage as creditors of James Dunlop, which they would not have possessed if they had themselves paid the Company debts. In every case of a sequestration, the rights of the creditors must be taken as they stood when it was awarded, at which period the estate of the bankrupt becomes a fund of division among the creditors at large, *pro rata* of their debts, subject only to such preferences as then exist ; but when Mr Dunlop's estate was sequestrated, the Company were merely personal creditors, without any preference for the balance remaining due to them. As,

therefore, by sustaining the claims of the Company Creditors, a part of the sequestrated estate, which the Company would not otherwise have got, would come indirectly into their hands, it must *ante omnia* be refunded to the trustee, in the same manner as if by any accident a common creditor had got possession of it after the date of sequestration.

Answered for the Company Creditors ; It is a fixed principle of law, that every partner of a Company is liable for the Company debts. Although, therefore, the bonds of the claimants had been granted by the Company alone, the creditors would have been entitled to rank upon James Dunlop's estate. The case, however, is the stronger, from Mr Dunlop's being bound jointly and severally with the Company. The solvency of the Company cannot prevent the claimants from seeking payment from any obligant in their bonds. It was indeed for the very purpose of obtaining it more readily, that they took Mr Dunlop and the other individual partners bound *in solidum* for the debts. How far their claim to rank on Mr Dunlop's estate may benefit the Dunbarton Glasswork Company, is a question with which they have no concern. The Court will take care that it shall not give them any improper advantage.

THE LORD ORDINARY took the cause to report.

Observed on the Bench ; This is plainly an attempt on the part of the claimants to give an indirect preference to the Glasswork Company, to which they have no right. The Company being solvent, ought to pay their own debts ; and if these should be paid in part out of the sequestrated estate, the Company would not be allowed, in ranking for the balance due to them by Mr Dunlop, to insist on any preference which they would not have possessed, had the Company Creditors been paid wholly from the Company funds.

THE COURT found, That the claim now made by the Creditors of the Glasshouse Company must be viewed in the same light as if it had been made by the said Company itself ; and therefore found, That said Glasshouse Company are only entitled to rank for the debt due to said Company by James Dunlop, after deduction therefrom of the value of his share of said Company's funds, as at the 31st December 1792 ; and found expences due.'

Lord Ordinary, *Craig*.

For the Trustee, *Lord Advocate Dundas, Solicitor-General Blair, Davidson, Moodie*.

For Creditors of the Company, *Rolland, Hope*.

Clerk, *Menzies*.

R. D.

Fac. Col. No 195. p. 469.

1797. February 28.

RICHARD HOTCHKIS, Trustee for the Creditors of ADAM KEIR, against The
ROYAL BANK of SCOTLAND.

No 136.
The Royal
Bank of Scot-
land was
found entitled

BERTRAM, GARDNER and COMPANY became bankrupt, deeply indebted to the
Royal Bank of Scotland.

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No 136.

to retain the stock of an insolvent proprietor, for payment of debts due to the Bank, by a company of which he was a partner.

Adam Keir, one of the partners of the Company, held L. 2000 of the stock of the Bank, who, in terms of a by-law passed in 1728, refused to allow it to be transferred to the Trustee for the creditors, till security was found for payment of the debt due by the Company to the Bank.

Upon this, Richard Hotchkis, the trustee, brought an action against the Bank, to compel them to transfer the stock, in which he

Pleaded ; By 5th Geo. I. c. 20. the public creditors of Scotland were incorporated under the name of the Equivalent Company, and their stock, (for payment of the interest of which an annuity was funded,) was made transmissible by a transfer in the books of the Company, § 6.

In 1727, a charter was granted, allowing such of the members as should choose it, to subscribe their stock, and carry on the trade of banking, under the name of the Royal Bank of Scotland, with authority to make calls, not exceeding L. 50 *per cent.* on the sum subscribed.

By the original, and all the subsequent charters to the Bank, it is declared, that the shares 'shall not be liable to any arrestment or attachment that shall be laid thereupon, by any law, custom, or usage to the contrary notwithstanding.' And the shares are made transferable, as in the original Company, with these exceptions, that the Directors may prohibit a transfer, while the proprietor has not paid up the calls on his subscribed capital, and that they may retain dividends both in this case, and when fines have been incurred, imposed in consequence of by-laws, a power to make which, so far as consistent with the public law, is expressly given.

But the by-law in question was *ultra vires* of the Bank. The proprietors of the stock of a public incorporated company have a definite interest in their shares very different from the right of a partner in a private company, which extends only to the balance remaining after the debts of the company are discharged, and the right of retention competent to the latter society is excluded in the former ; Equity Cases Abridged, v. 1. p. 8. 1728, Assignees of Beck against the Royal Assurance Company. If it had been understood that the Bank had a right of retention at common law, there would have been no occasion for giving it in the two particular instances above-mentioned ; and as legal diligence is excluded, *a fortiori* must the private right of retention.

Answered ; There is no difference at common law, as to the question of retention, between the shares of incorporated and other societies.

The charters of the Bank were meant to introduce exceptions from the common law in its favour, and nothing short of an express enactment could exclude it from the right of retention competent to every private society. The two cases in which it is expressly given were mentioned merely *ob majorem cautelam* ; and the clause excluding diligence applies only to third parties.

The by-law passed in 1728, has been uniformly enforced.

THE LORD ORDINARY reported the cause on informations.

It was observed, that the by-law in question was merely corroborative of the common law. No 136.

THE LORDS unanimously 'assolized the defenders.'

A reclaiming petition was (11th March) refused, without answers.

Reporter, Lord Melboen. Act. Jo. Clerk. Alt. H. Erskine. Clerk, Sinclair.

D. D.

Fac. Col. No 19. p. 42.

*** Two other cases, in similar circumstances, were decided in the same manner.

SECT. XVI.

Effect relative to Prescribed Debts.

1705. January 31.

SIR JOHN GORDON of Park, and ANDERSON of Auchinreath, his Assignee,
against HAY of Ranas.

No 137.

The Lords sustained compensation by way of exception, although it could not be pursued by way of action, the ground of compensation being long since prescribed.

SIR JOHN GORDON of Park, and Anderson of Auchinreath, his assignee, pursue Hay of Ranas, on his predecessor's bond.—*Alleged*, Park's father was debtor in 6000 merks of tocher, by a contract of marriage betwixt his daughter and Ranas's father, and thereon he craved compensation.—*Answered*, The contract of marriage whereon the compensation is craved is long ago prescribed, the last document taken being in 1659.—*Replied*, However actions prescribe in 40 years, yet the exception of compensation is always competent to be proponed, and never prescribes, because *ipso jure* there is *concurus et contributio debiti et crediti*, and operates from the concurrence whenever it is opposed, unless the course of the two debts were without the 40 years; and thus it was lately found, between Crawford and Creditors of Cornwall of Bonhard, that a debt prescribed *quoad actionem*, yet was receiveable *per exceptionem recompensationis*. See PRO-
GRESS.—*Duplied*, That exceptions are likewise the ground and foundation whereon actions, either of declarator or payment, may proceed; and therefore, no such actions being intended within the 40 years, the exception expires, as well as the action on the principal writ founded on; and if Ranas were now pursuing Park for the 6000 merks of tocher on that contract, he would be excluded, because not pursued for within 40 years; so, by the same rule, he cannot claim compensation for that tocher contained in that contract, for *sublato fundamento totum opus corruit*, and it has no ground to stand upon; and he ought to have craved

No 137.

it within the time limited by law, which not having done, *sibi imputet*.—*Answered*, That defence is *juris naturalis*, and may be used at all times whenever one is attacked, and is a privilege which never prescribes; yea it may be proponed by one who has no right to the debt whereon the compensation is sought; as in heirs and executors, if the credit-part belong to the heir, and the executor be convened, he may found on a compensation belonging to the heir; and so in compensations betwixt arresters and adjudgers.—THE LORDS considered this point as nice, *et in apicibus juris*, yet being formerly decided, they would not vary, but found the compensation was not prescribed, and so yet receiveable. *See PROCESS.*

Fol. Dic. v. 1. p. 165. Fountainball, v. 2. p. 263.

* * * Dalrymple reports the same case :

ANDERSON of Auchinreath, as assignee by Gordon of Park, pursues Hay of Ranas for payment of a sum contained in his grand-father's bond, upon which he had obtained a decret against the defender's father.

The defender *alleged* compensation upon a contract of marriage betwixt the defender's said father, and Park the cedent's sister, whereby Park was bound to pay a tocher exceeding the sum libelled, deducting all payments of the tocher.

It was *answered*; The contract was prescribed.

It was *replied*; No course of time could exclude the defence of compensation, which was competent before prescription run, and does operate *ipso jure*, and extinguishes the debt *a momento concursus debiti et crediti*, and cannot revive by the course of time; and generally all defences and exceptions are perpetual, however actions may prescribe; and so it was lately found in the case of Crawford against the Lady Bonhard, where recompensation was sustained upon a holograph writ after 20 years, on that special ground, that it was founded upon not by action, but by exception and reply; and the defender's predecessor had no reason to pursue for the remainder of the portion, knowing that he was also debtor, and thereby his claim was compensated. *See PROCESS.*

It was *duplied*; That compensation operates indeed *ipso jure, si opponatur*; but if the debt on which compensation is craved can be elided by any reply, it takes no place; for compensation must be on a debt at the time it is alleged upon, and then it operates from the concurrence; but if there be any *medium impedimentum* before it be applied, it takes no place.

THE LORDS found, That compensation being proponed by way of defence, was competent, notwithstanding the contract, which was the ground thereof, was prescribed *quoad actionem*.

Dalrymple, No 56. p. 71.

* * * The same was found, No 106. p. 2642.

1712. *January 18.*ROBERT HERRIES in Forberliggit, *against* SIR GEORGE MAXWELL of Orchard-toun.

IN the action at the instance of Robert Herries, against Sir George Maxwell, as representing Sir Robert Maxwell his father, for payment of L. 260 of principal, with penalty and annualrent contained in a bond granted by him to Janet Affleck in Midtoun of Spots, and assigned by her to the pursuer her son. The defender proponed compensation, upon this ground, That he offered to prove by the pursuer's oath, that his cedent possessed the lands of Spots, as tenant to the defender's father, for more years than the rent thereof would satisfy the bond.

Alleged for the pursuer; It being more as 30 years since his cedent possessed these lands, the defence of compensation upon her possession ought to be repelled; unless it be offered to be proven by the pursuer's oath, that these years rents of the lands possessed by his cedent are still resting owing, they being prescribed *quoad modum probationis*.

Answered for the defender; From the very terms the rents fell due, they compensated and extinguished the bond, by the course of debit and credit betwixt the parties, as effectually as if the pursuer's father had got a discharge thereof; and though action for these rents be prescribed as to the manner of probation, the defence of compensation thereon is perpetual, and must be sustained, unless that the pursuer can prove that the rents were *aliunde* paid.

THE LORDS repelled the defence of compensation, unless the defender offer to prove by the pursuer's oath, that the rents of the lands possessed by his cedent are still resting owing.

*Forbes, p. 579.*1719. *July.*SIR JAMES CARMICHAEL of Bonington *against* CARMICHAEL of Mauldsly.

SIR JAMES CARMICHAEL pursues Mauldsly upon several grounds of debt, owing by Mauldsly's predecessors to his predecessors; Mauldsly propones compensation upon greater sums due by the pursuer's grandfather to his predecessor, as executor confirmed in a testament made by Captain John Carmichael, anno 1644, wherein he nominates his two brothers, Sir Daniel and Sir James Carmichaels', predecessors to the parties in this process, his executors, and wherein Sir James, the pursuer's predecessor, was the sole intromitter. It was *objected* for the pursuer, That this reciprocal claim founded on the testament, was prescribed by the lapse of forty years, no document having been taken thereon; and being thereby extinguished, it could neither be the foundation of an action or exception.

It was *answered* for the defender, That the nature of compensation is such, that where there is a concurrence betwixt two debts, there necessarily must arise a mutual extinction; and if once there be an extinction, then without doubt,

No 138.

In an action for payment of a bond, the defence of compensation upon a debt once due by the creditor pursuing to the debtor, prescribed *quoad modum probationis*, and referred to the pursuer's oath, was repelled; unless the defender would offer to prove, also by the pursuer's oath, that this debt is still resting.

No 139.

Compensation found not proponable upon a debt despite by the forty years prescription, and this tho' there was a *concursus debiti et crediti* long before the running of prescription.

No 139. the allegiance that the debt pursued on is extinguished, must be competent to the defender at any time when that extinguished debt comes to be pursued upon; or any other way brought in judgment against him: It is very true, that where there is a mutual concurrence of debts, there is a double effect; each party, if he pleases, may pursue upon his own debt, and oblige the other either to pay, or to take the benefit of the compensation; and that other has it again in his option, whether he will make use of the benefit of the compensation, and propone the extinction, or if he will neglect it, and pay the debt pursued for: But then he cannot do this without the other's consent, because that other, if he will, may force an extinction, by insisting to have it declared, That from the time of the concurrence, the debts were mutually satisfied; the force of which conclusion the other party cannot evade. But if both parties expressly, or tacitly, agree, That the debts shall not mutually extinguish one another, then indeed the concurrence has not its legal effect: But still it is plain, there is really an extinction *ipso jure*. In the same manner the exception of payment itself may be passed from, where both parties agree to it, and where there is no *medium impedimentum*, or damage arising to a third party: So if a discharge be granted, that discharge may be passed from and delivered up, and the debt continue a good debt; and, of late years it was found, that where there was a renunciation granted of an infeftment, that renunciation might warrantably be given up, and the old infeftment take place, there being no *medium impedimentum* or after creditor prejudged, All this is to prevent an objection, as if compensation could not operate *ipso jure*, because it may be passed from; for so may any other instruction of payment. Nor is there any inconsistency in what is commonly said, That compensation must be proponed, otherwise it has no place; for it must be proponed, not in order to make the extinction, but as the lawyers express it, *ad manifestandum*, and, in order to have the extinction, which had before taken place, ascertained by a legal sentence; and so the matter is very well explained by the learned Voet, *tit. de Compensationibus*, num. 2. This then being the nature of compensation, it is not conceivable how the prescription of any one of the concurring debts, should take away the benefit of the exception from the creditor, since at proponing the exception, he does not found upon the debt as a subsisting debt, but as a document of the extinction of the other debt.

It was replied for the pursuer, That in our law, compensation operates not *ipso jure* upon the mutual existence and concurrence of the debts, until the ground of compensation be proponed and applied; then indeed it operates *re- tro*: But till proponing, the mutual debts remain unextinguished. For the more full understanding of this scheme, it is to be observed, compensation is not by our law allowed in the same extent that it was in the later times of the Roman law. The learned Vinnius observes, in his Commentary upon the Institutes, *tit. Action*, § 30, That the privilege of compensation was at first only introduced in *bonæ fidei judiciis*, *ex bono et æquo*; thereafter, by the constitution of Divus Marcus allowed in *stricti juris judiciis*, *opposita doli mali excep-*

tion; and lastly by *Justinian*, introduced in all cases *ipso jure*. It is adopted by us in the middle way, *opposita exceptione*; which the statute Ja. VI. Parl. 12. c. 143. in terms bears, 'That any debt *de liquido in liquidum*, before giving decret, be admitted by all judges within this realm by way of exception; but not after the giving thereof in the suspension, or in the reduction of the same decret.' And so indeed is introduced no otherwise but as a *re-convention* privileged to be proponed by way of exception; for of its proper nature it is not even an exception, as Lord Stair observes, where he says, 'It is neither payment formally nor materially.' For when a creditor borroweth from his debtor, and obliges himself to pay at a day, a mutual credit arising, from the nature of the thing, affords no exception against payment, but each party must insist for his own claim. Accordingly compensation has place only in those countries where it is introduced by statute, or where the Roman law prevails, and had no place with us before the act 1592; and established by positive law, for utility's sake alone, to shun multiplicity of pleas, upon the principle, *Frustra petit quod mox est restitutus*. Hence it is that the effects of compensation are not so full in our law, as with the Romans; for among them it was competent after sentence, *l. 2. Cod. Compensat.* not so with us: When one paid who had a ground of compensation, he had a *condictio indebiti*; which would not obtain with us: Horning is not taken away by compensation, by a sum due to the party denounced, equal to that in the horning, not being actually applied by process or contract, as Lord Stair observes, *l. 3. t. 3. § 12.* which yet it would, did compensation extinguish *ipso jure*. And indeed the rule is general, that where a debt is not taken away *ipso jure*, but only *ope exceptionis*, the debt still remains unextinguished till the exception be proponed; and at the time of proponing, the validity of the exception is to be considered.

Duplied for the defender, To hold that compensation operates not *ipso jure*, is to go against a principle; for, if it has no effect before it be proponed, how could it stop the course of interest? Relieve a cautioner? Be good against an assignee even for an onerous cause? Or against an arrester arresting after the concurrence? These are all *media impedimenta*, such as would hinder the proponing of compensation, if it was to take effect only from the time of proponing, and not from the time of the concurrence. Nor is the observation of any use, that by express statute, compensation is not admitted after decret: An act of Parliament might have appointed that a discharge should not be received after a decret, and might have left the party discharged, to his action of repetition *indebiti condictione*; but that would not have altered the nature of payment, or hindered it to be an *ipso jure* extinction. No more does the statute founded on alter the nature of compensation; it bars indeed the proponing of it after sentence; and so in that case, the act of Parliament has the same effect, that the mutual consent of parties renouncing or passing from the compensation would have: But still the nature of the exception remains the same, and when warrantably proponed, must operate *ipso jure*, so as to extinguish from the time of the concurrence.

No 139.

Triplied for the pursuer, Though compensation is proponable against assignees, voluntary and legal, and that *retro* the *cursus usurarum* is stopped; that is no proof of its operating *ipso jure* before proponing: For, as to the first, it arises from another rule, viz. *Quisque utitur jure auctoris*; what is competent against the cedent, is competent against the assignee, because assignees and arresters are only mandatars *in rem suam*; they act in their author's name, and upon his right, and must consequently sustain all objections competent against him. *Vide* Stewart and Nisbet, *voce* EXCEPTION. And the other of operating *retro*, is *ex officio judicis* from the equity of the thing, and not at all *ipso jure*.

Quadruplied, Though the old style of assignations run as they were only mandates, yet in our present practice, assignation with intimation is looked upon as a complete conveyance *funditus* denuding the cedent; the assignee accordingly can act in his own name, and the cedent must be reinstated in his former right, upon the medium of a new conveyance from the assignee; which are each of them demonstrations, that an assignation is somewhat beyond a mandate, and no less than a complete conveyance.

There was a separate ground insisted on for the pursuer, in this shape, That allowing compensation operates *ipso jure*, yet the testament pretended to compensate on, being prescribed *quoad modum probandi* by the lapse of forty years, there was no legal evidence remaining, that ever there was such a debt, that ever there was a concurrence, or mutual extinction: For it was *pleaded* in general, That all obligatory writs prescribe, and are not *instrumenta probatoria* after forty years. To which it was *answered*, *imo*, The law has not said so. *2do*, It is not conceivable how it can be so, That a writing completed with all solemnities that law requires, should be probative to-day, and not to-morrow. It does indeed sometimes happen by force of express statute, that a writ not having all the solemnities which law requires, should, after such a limited time, need to be further supported, as happens in the case of holograph writs; but it never was heard, that a deed fully complete, with all its solemnities, should not be probative after currency of whatever number of years. *See* PRESCRIPTION.

'THE LORDS found, That compensation cannot be proponed upon a debt after running of the forty years prescription.'

Fol. Dic. v. 1. p. 165. Rem. Dec. v. 2. No 17. p. 35.

No 140.

Tack-duties extinguished by the quinquennial prescription upon act 1669, not proponable as a ground of compensation.

1753. August 10. JOHN BAILLIE *against* M^cINTOSH of Aberarder.

IN the year 1730, M^cIntosh of Aberarder accepted a bill for 500 merks to Duncan M^cIntosh. In the year 1731, Duncan took a nine years tack from Aberarder of certain lands, at a tack-duty of 200 merks yearly. Before the close of the tack, Duncan turned a notour bankrupt, and fled the country. Returning several years after, he conveyed the sum in the above mentioned bill to one of his creditors; who, in a process against Aberarder's son and heir,

insisted for payment. The defence was compensation upon the tack-duties, which had never been cleared. *Answered*, The tack-duties are prescribed by the act 1669, it being more than five years since the tacksman's removal. *Replied*, The act only bars an action for payment after the five years, but not an exception as in the present case, where payment is not demanded of the rent, but only in extinction of a separate obligation by compensation. *Duplied*, The genuine effect of the statute is to presume payment of rents which are not claimed for five years, till the contrary be proved by writ or oath. It may be true that Aberarder would put nothing in his pocket by claiming payment of the rents, when he was owing to the tacksman an equivalent sum by bill. But this circumstance, whatever effect it may have with regard to presumption founded upon circumstances, ought not to be regarded against a statutory presumption, with which judges can take no liberty.

THE LORDS were unanimous, that compensation is not relevant in this case, more than where the compensating debt is opite by the long prescription.*

Sel. Dec. No 53. p. 67.

SECT. XVII.

Effect of Compensation, of Retention, of Re-compensation in instances not included in the Preceding Sections.

1664. July 14. BALMERINO against Sir WILLIAM DICK'S Creditors.

JAMES GILMOR, for the use of the Lord Balmerino, being infeft in the lands of North Berwick, upon a right from Sir John Smith, who had right from Sir William Dick, pursues the tenants for mails and duties. Compareance is made for Sir William's other creditors, wadsetters and apprisers, who allege absolutor, because the pursuer's right is extinct, in so far as Balmerino being debtor to Sir William Dick, and charged by him, had acquired this right from Sir John Smith, to compensate Sir William, and did actually compensate him, by alleging the same reason of compensation, producing the disposition then blank in the assignee's name; whereupon the letters were suspended *simpliciter*, and my Lord assoilzied; and the disposition given up to Mr Alexander Dick, which is instructed by the testimony of William Downie, clerk at that time. Balmerino *answered*, First, That William Downie's testimony could not make up a minute of decret, where there were no process, nor adminicle to be seen. *2dly*, Though the minute of the decret were lying before the Lords, not be-

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No 141.
Before litigation or decree, the defender may pass from his defence of compensation, so as to be at liberty to use the writ upon which he might compensate to any other purpose.

No 141. ing extracted, the Lord Balmerino might pass from his reason of compensation, and take up his disposition, which is always permitted before litiscontestation, or decret; and litiscontestation is never accounted until the act be extracted: So that there being no act of litiscontestation extracted in the said process, but only an alleged minute of a decret without an act, neither party might resile. *3dly*, Though the suspender might not resile *simpliciter*, yet it is still competent to him, to propone a several reason of suspension before extract, being instantly verified; and now he propones this reason, that the debt owing by him to Sir William Dick, is a public debt, and the Parliament has suspended all execution thereupon, till the next Parliament; which by consequence liberates him from making use of, or instructing his reason of compensation. The creditors *answered*, It was most ordinary for the Lords to make up minutes by the testimonies of the clerks, when they were lost. So that William Downie being a famous clerk, his testimony must make up the minute, after which the Lord Balmerino cannot resile from his reason of compensation, or take back the disposition, seeing it was his own fault he did not extract it, and cannot make use now of a supervenient exception, that was not at that time competent, in prejudice of their creditors, Balmerino being now in a much worse condition.

THE LORDS found, That the Lord Balmerino might now propone a reason of suspension emergent on the late act of Parliament, and pass from his reason of compensation, and take up his dissposition, seeing it did not appear that the process was miscarried through Balmerino's fault, or that the disposition was delivered to Mr Dick, neither of which did appear by William Downie's testimony.

Fol. Dic. v. 1. p. 168. Stair, v. 1. p. 214.

1669. February 5. CLELAND against STEVENSON.

No 142.

Compensation being sustained upon a decret, liquidating a quantity of victual, due by the charger to the suspender, the same was found to operate from the time the victual became due, and was not restricted to the date of the decret.

WILLIAM CLELAND charges John Stevenson upon a bond of 400 merks, bearing annualrent. He suspends on this reason, That the charger was owing him more for victual, being his tenant, which was now liquidated before this time, but after the date of this bond, and craved compensation thereupon, not only from the date of the liquidation, but from the time the victual-rent was due.

Which the LORDS sustained.

Fol. Dic. v. 1. p. 167. Stair, v. 1. p. 598.

* * * Gosford reports the same case:

STEVENSON being charged upon a bond granted to Cleland, for 400 merks, in *anno* 1646, did suspend upon this reason, That he was assigned to a tack-duty for the said year, due by Cleland to his father, whereupon he had obtained a decret of liquidation in *anno* 1664, which ought to be drawn back to the year

1646, which was the time the tack-duty was owing; and so the question was, if the tack-duty, not being liquidate till the year 1664, should liberate from all bygone annualrents of the 400 merks, preceding the liquidation.—THE LORDS did find, That it ought to be drawn back and liberate from all annualrents, notwithstanding it was alleged, that until the liquidation there could be no compensation, which was only competent *de liquido in liquidum*; for albeit before the liquidation they could not have suspended to hinder payment, yet they found, that liquidation being made before the charge, it ought to be drawn back to its first cause to save from usury, which was odious; as likewise, because the charger, during all that time, had the benefit of the product of the victual, which was the tack-duty.

Gosford, MS. p. 37.

No 142.

1675. July 23.

CRUICKSHANK against KER.

ALEXANDER CRUICKSHANK having right by translation to a bond granted by Ker of Littledean, charged him thereupon. He suspended upon this reason, That he had compensation against the cedent, who assigned him to a greater sum; and, contrary to his assignation, and the warrandice therein, had discharged the same himself. This reason was sustained, but the question arose *a quo tempore* the compensation should take effect, whether from the date of the discharges, or from the time that the discharges were produced.

THE LORDS found, That the warrandice was not liquid to found a compensation on of itself, till it was liquidated by application thereof to the discharges produced, by which the warrandice was contravened; and therefore allowed the charger's sum to be accumulate with annualrents, till the production of the discharges, and then to be compensated by the discharges.

Fol. Dic. v. 1. p. 167. Stair, v. 2. p. 361.

No 143.

A debtor opposing compensation to an assignee, upon a claim of warrandice, incurred by the cedent, the compensation was found not to take place from the time the warrandice was incurred, but only from the liquidation.

*** Gosford reports the same case:

ALEXANDER CRUICKSHANKS, as having right by translation to a bond granted by Ker of Littledean, to Nicolas Turnbull, for the sum of 250 merks, contained in a bond, bearing annualrent from Whitsunday 1658, did charge Littledean for payment, who did raise suspension upon this reason, That the said Nicolas was debtor to the suspender in greater sums before her assignation to the charger's author, in so far as she had assigned the suspender to a bond of 700 merks, bearing annualrent, due by Andrew Crombie of Cruilly, with absolute warrandice; and notwithstanding she had granted two discharges, one of the whole bygone annualrents, and another of L. 100 of the principal sum before the assignation, so that by the obligation of warrandice, she was debtor in these sums, which did exceed the sums charged for.—It was answered for the charger, That the

No 143.

reason resolving into a compensation could not now be admitted, unless the warrandice had been made liquid by a decret against the said Nicolas, as having contravened; neither is there any intimation produced, or diligence done by the suspender, upon the said assignation, whereupon only he could have had his recourse against the said Nicolas; and she being now dead, the reason cannot be sustained against her assignee, at least if it were found a ground of compensation. It can only be sustained against the charger, who is a singular successor, from the time of the raising that suspension, and insisting upon that reason. —THE LORDS, finding that the reason of suspension being founded upon writ, making the charger's cedent debtor upon the clause of warrandice, and the contravening thereof, which was proven *scripto*, did sustain the same against the charger, who was assignee, unless he could allege against the discharges produced, for instructing of contravention of the warrandice; but the reason resolving in a compensation, there was debate among the LORDS *a quo tempore* it should be sustained, whether from the date of the assignation bearing the warrandice, or from the time that it was insisted on in the suspension; and at last it was voted to be only sustained from the raising of the suspension, and insisting thereon, upon these reasons, That the charger was a singular successor, and did intimate his assignation during the cedent's lifetime, who might have elided the same in law, there being nothing produced but extracts of her discharges; likeas the charger being assigned for an onerous cause, and having intimate his right to the suspender, did never make mention of this compensation until after the death of the cedent; so that it ought not to militate against him but from the date it was insisted on, albeit it would have been sustained against the cedent since the date of the assignation and warrandice.

Gosford, MS. No 791. p. 498.

1675. December 4. WATSON against CUNNINGHAM.

No 144.

It was found, that money may be compensated by debursements of money from the time of debursement, or intromission with money-rent, but not by victual or any prestation, until that be liquidated or reduced to money.

WATSON of Glentop having charged Robert Cunningham upon a bond of borrowed money, which he suspends upon compensation of debursements by him for the charger, in reducing an apprising, and several other affairs, and for allowances to his own servants of meat and drink that the charger got in his house, and for his own service; which being referred by the charger to the suspender's own oath, he deponed; which being advised by the LORDS, this question arose, *a quo tempore* the compensation should take effect, whether only from the date of the sentence, by which it is liquidate, or from the time the oath prove it was due; the ground of the doubt being, that compensation is only competent *de liquido in liquidum*, and therefore can have no effect till the liquidation, which was not till this sentence; for by our custom, no debt is counted liquid till it be determined by a sentence, and thereby have *paratam executionem*.

THE LORDS found, That liquidation requisite for compensation did only import that both debts were of the same kind, to be estimated as a fungible quantity, and therefore money may be compensated with debursements of money, from the time of deburserment or intromission with money-rent, but not with victual, or any prestation, until the same were liquidate or redacted into money; and therefore the LORDS allowed the compensation of the suspender's debursements, from the time they were given out, but of the modification for his own service allenarly from the time of the decret, liquidating the same.

Fol. Dic. v. 1. p. 167. Stair, v. 2. p. 375.

. Dirleton reports the same case, naming the parties CUNNINGHAM against MAXWELL.

A BOND being suspended upon a reason of compensation, viz. that the suspender had debursed diverse sums, (confrom to an account) for the charger; and the said reason being referred to the charger's oath, and deferred back again to the suspender's oath; it was debated among the LORDS, *a quo tempore* compensation should be sustained; whether from the time of the debursements, or from the time the same was liquidate and cleared by the suspender's oath; and it was found, That compensation should be sustained from the time of the debursements, seeing the said sums then grew to be due.

Debts being illiquid, either because not constituted by writ or decret, or because they are not due in money but in victual, or such like, which must be liquidate as to the prices and value before there can be any execution for the same; the question may be of greater difficulty as to the last, seeing *compensatio* is *solutio*, and *ipso jure minuit*; whereas a debt in money cannot be said to be payable, and far less to be paid in victual, unless the creditor be content to be satisfied that way.

Dirleton, No 309. p. 152.

1678. July 26. The LAIRD of POURIE against HUNTER.

POURIE pursues reduction of his vassal Hunter of Burnside his infeftment, *ob non solutum canonem*, the infeftment bearing a clause, That it should be null if two terms run in the third unpaid.—The defender *alleged* absolvitor, because he produced a discharge for the year 1672. and precedings; and as to the year 1673, he offers to prove, that he delivered the feu-duty to Pourie's servant in his own presence, without contradiction; and though it was sent back to him *ex post facto*, yet it was sufficient to purge an odious clause irritant, being now offered to be furthcoming at the bar; and as to the subsequent years, he offers to prove offers were made before the three terms were run; *2do*, The pursuer *intus habuit*, being debtor to the defender in a liquid sum exceeding the feu-

No 145.

Compensation not sustained to purge an irritant clause.

No 145. duties.—The pursuer *answered* to the *first*, an offer *non relevat* without consignation; neither was compensation competent against feu-duties, wherein the acknowledging of the superior, by an address of an yearly payment, is more considered than the value of the feu-duties; neither can clauses irritant, express in infeftments, be purged at the bar; for they differ therein from the irritancy introduced by law, that these may be purged; but where the investiture contains the clause ‘to be null in case of three terms unpaid,’ the same cannot be purged.

THE LORDS did not sustain purging at the bar, nor the compensation; but found the payment to the pursuer’s servant without contradiction, and the offer *debito tempore*, though without consignation, being now made furthcoming at the bar, relevant to purge the clause irritant, albeit the offer, without consignation, cannot stop the course of annualrents.

Fol. Dic. v. 1. p. 168. Stair, v. 2. p. 642.

* * * Fountainhall reports the same case :

THE LORDS inclined to think, the vassal should not compensate his feu-duties, with any debt his superior is owing him; but it being a recognizance, it should be offered with humility.

Fountainhall, MS.

* * * Lord Kames cites a case, 17th July 1625, Lord Touch against Fairbairn, from Haddington, importing, that, contrary to the above, compensation had been sustained to purge an irritant clause.—Lord Haddington’s MS. in the Advocate’s Library, does not come down to so late a date. If the case shall be found, it will be inserted in the Appendix relative to this Title. See IRRITANCY.

1687. February 2. ROBERT WEMYS *against* GOODSIR.

No 146.

THE price of spuilzied goods found to compensate, and sist the course of annualrents of a debt due to the spuilzier, from the time of the liquidation, and not from the time of committing the spuilzie.

Fol. Dic. v. 1. p. 167. Harcarse, (COMPENSATION.) No 264. p. 63

No 147.

In a suspension of a charge on a bond, the suspender craved compensation of a sum due to him by

1711. July 10.

IRVINE *against* MENZIES.

CHARLES MENZIES, writer to the signet, being debtor to Mr Alexander Irvine of Saphock in L. 319, by bond, and charged thereon, suspends, that he must have compensation for L. 212, contained in a bill due by Irvine, to which he has right.—*Answered*, Your compensation cannot extinguish my debt; because I

recompense you again, in so far as I am cautioner for you in a 3000 merks bond, whereof you are bound to relieve me; and so I must have retention of your L. 212, whereon you ground your compensation, till you relieve me of that debt. —*Replied*, There can neither be retention nor recompensation, unless you were distressed and had paid the debt. And seeing the concurrence of the two debts does, *ipso jure*, extinguish one another, no pretence of retention can make a debt extinct to revive; the bond of relief being only an obligation *ad factum præstandum*, and so illiquid. —*Duplied*, His claim of retention is founded both in the common law, in reason, and in the analogy of our municipal law; and *first*, the Roman law is plain, in *l. unica C. etiam ob chirograph. pecun. pignus retineri posse*; though you pay me the debt for which I had the pledge, yet I'll retain it if you owe me any sum, till that be likewise paid or secured. Next, this retention is founded in reason; for, if I have your effects in my hand, and you owe me money, you cannot draw them out till you pay; it being *tutius rei inherere quam in personam agere*; 3^{to}, As to our own law, a creditor in relief cannot, by any diligence [of arrestment or otherwise, affect the subject in his own hands, as if it were in another's; for supplying which difficulty, law has allowed retention; and was so found betwixt Ballenden and Sinclair *, and 14th February 1708, Mr Patrick Strachan and the Town of Aberdeen, No 60. p. 2609. And though he be not yet distressed, he knows not how soon he may be overtaken, the creditor having *paratam executionem* against him when he pleases; so that it is more than a mere *factum præstandum*. —THE LORDS found, That the retention took place against the liquid compensation, and that he was not bound to let this debt be extinguished by the compensation, till he was relieved of his cautionry.

Fol. Dic. v. 1. p. 168. Fountainball, v. 2. p. 657.

1711. November 23.

ALEXANDER MURRAY of Brughtoun, against WILLIAM M'GUFFOG of Ruscoe.

RICHARD MURRAY of Brughtoun, debtor to the deceased William M'Guffog of Ruscoe; in 4000 merks, by an heritable bond dated in *anno* 1675, did, by a tack of the same date, narrating the bond, set to him the lands of Murraytoun and Cullindoch, for payment of 240 merks, two wedders and two stone of butter yearly; with this provision, 'That the tacksman should retain in his own hands of the foresaid tack-duty, in so far as will compense and satisfy his annualrents yearly and termly during the not payment of the principal sum.' Alexander Murray, now of Burghtoun, heir to Richard his grand-father, pursued a reduction and declarator of extinction of the heritable bond, by Ruscoe the defender, and his predecessor's possession of the lands several years without paying any tack-duty; and *contended*, That the prices of the wedders and but-

No 147.

the charger *per bill*. The charger proposed recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore must have retention of the sum in the bill till he be relieved, though the charger was not yet distressed. The Lords found, that the retention took place against the liquid compensation, and that he was not bound to let the debt be extinguished by compensation, till he was relieved of his cautionry.

No 148.

A man, for security of a sum due by heritable bond, getting a tack of some lands, for a duty equal to the annualrent of the sums, at six *per cent*. and being besides obliged to pay yearly two wedders, and two stones of butter, dor.

* EXAMINE GENERAL LIST OF NAMES.

No 148.

ing the 21 years that the tack was to last ; and he never having paid these ; in a declarator of extinction and payment, the Lords having first caused liquidate the prices of the wedders and butter, did then find that they could only compensate and impute from the time of the liquidation, and not yearly when they fell due.

ter, liquidated in this process, ought to be imputed in payment and satisfaction of Roscoe's principal sum, at the terms they fell due by the tack.

Answered for the defender ; *Species* or *corpora* cannot compensate money till once they be liquidated, and then the compensation takes place only from the date of the liquidation, 4th December 1675, Watson against Cunningham, No 144. p. 2684 ; consequently the butter and wedders can compensate and extinguish the defender's principal sum only from the time of the liquidation.

Replied for the pursuer ; Where a creditor intromits with goods and effects of his debtor, upon some extrinsic cause, the rules of compensation and liquidation ought to take place ; but it is otherwise in the case of intromission with a subject given in security and payment ; as here, where the tacksman was just in the case of an improper wadsetter, whose intromission with the rents doth still impute from the time they are uplifted ; and in effect, this extinction doth not so much arise upon the ground of compensation, as of payment.

Duplied for the pursuer ; It is frivolous to fancy Ruscoe in the case of an improper wadsetter, for he never entered to possession by virtue of the heritable bond, (which was a transcendent heritable right upon Brughtoun's whole estate) but only by virtue of his tack ; by which he had indeed power to retain the tack-duty, in so far as would satisfy his annualrents, but not for payment of his principal sum.

THE LORDS found, That the compensation upon the butter and wedders, takes effect only from the time of the liquidation.

Fol. Dic. v. 1. p. 167. Forbes, p. 549.

* * * Fountainhall reports the same case :

LORD ORMISTON reported Murray of Brughton *contra* M'Guffog of Ruscoe. Brughton being debtor to Ruscoe in 4,000 merks, he gives him an heritable bond ; and, towards his farther security, he sets him a tack of some lands for 21 years, for payment of 240 merks, with two wedders and two stones of butter ; but containing this clause, that he shall retain the said 240 merks of tack-duty, to compensate and satisfy the annualrent during the not payment of the said principal sum. Ruscoe having retained the said 240 merks yearly, being the full annualrent of the said 4,000 merks, at six merks per cent. then the current interest ; but retention having taken place ever since 1678, some times at five per cent., and then at five and a half ; and never having paid the wedders and butter, during the 21 years of the tack, Brughton raises a declarator of payment and extinction of this bond, in so far as Ruscoe had more than the annualrent ; *imo*, By the retention ; and then by the wedders and butter, which two articles behoved to deduct off the principal sum, and extinguish it *pro tanto*. A term was assigned to Brughton, to prove the value and price of the wedders and butter. Which being liquidate, he then craved they might be imputed in

payment and satisfaction of Ruscoe's principal sum, at each term as they fell due by the tack, to defalk *pro tanto*; for where one intromits with a *corpus* or a fungible, the liquidation *ex post facto* must retrotract and draw back to the time it fell due, especially if there was a *mora* in paying it *debito tempore*; for then *obligatio crescit ratione moræ*. *Answered*, The value can only be imputed from the time of the liquidation of the price of the butter and wedders, conform to the probation, and the Lords' interlocutor thereon; for money can never be compensated with a *species* till it be estimate, and so converted into money; and it was so found, 4th December 1675, Watson *contra* Cunningham, No 144. p. 2684. And Stair, *tit. LIBERATION FROM OBLIGATIONS*, is express, that farms and services can only compensate clear bonds from the date of their liquidation, and no sooner, unless it were money-rent. Put the case, a master is owing his tenant 1,000 merks by bond, the tenant is again debtor to him in a year's rent, (of ten chalders of victual), the tenant requires his money, will any lawyer say, the master will get immediate compensation to stop execution on his bond because his tenant owes him? For a *corpus* and a liquid sum are not compensable, being of different kinds; and therefore the master must first obtain the sentence of a Judge, liquidating the victual to a certain price, and then only, and not till then, will the compensation meet. THE LORDS found, the wedders and butter could only compensate and impute from the time of the liquidation, and not yearly, when they fell due. This imputation makes a great difference in the way of counting; for, as Brughton pleaded, it would have extinguished every year so much of the principal *sors*; but by this interlocutor, it only diminishes from the time of advising the liquidation; whereas in 21 years time (which was the currency of the tack), an annual imputation would have absorbed much of the sum, which an application now from this date leaves yet entire.

Fountainball, v. 2. p. 676.

1729. *June.*

MARQUIS of Clidsdale *against* COCHRAN of Ochiltree.

No 149.

A debtor, who stood also bound for his creditor in greater sums, refused to pay, unless he were relieved of his whole engagements; THE LORDS found the defender liable to apply the sum wherein he was debtor for payment of the debts for which he stood bound, but gave him his option to pay one or other, as he thought proper, so far as the sum in question would extend, and that at the sight of the Lord Ordinary. *See APPENDIX.*

Fol. Dic. v. 1. p. 168.

1733. *January.*

GRAHAM *against* DUKE of MONTROSE.

No 150.

A noblemian's commissioners having compted with his factor, struck a balance upon the whole save as to six articles, which were kept open to be adjusted by the con-

No 150. stituent himself; and accordingly, a docquet is adjected to the accompt, with a reservation of these articles, which were not liquidated till about ten years thereafter; the factor now insisting for payment of a bond due to him by his constituent, it was found, that the fitted accompt, bearing the foresaid reservation, was not a liquid ground of debt upon which compensation could be sustained; seeing reserved articles, some of which were sustained, fell to have entered into that accompt to diminish the balance, and therefore sustained compensation from the date of the total clearance only. See APPENDIX.

Fol. Dic. v. 1. p. 168

1753. July 31.

PATRICK HALDANE, ESQ. against ARCHIBALD Duke of Douglas.

No 151.

A debtor having lent money to his creditor on bond, and continued to pay the annualrents of debts which he owed without deducting the interest of the sum he had lent, found, notwithstanding, entitled to plead compensation upon that sum, in a competition with creditors.

THE Duke of Douglas was debtor to his sister Lady Jean Douglas, in the sum of 20,000 merks Scots, due by a bond of provision bearing annualrent, granted to Lady Jean by James Marquis of Douglas, her father.

The Duke, in March 1718, gave Lady Jean a further provision, by a bond for 30,000 merks Scots bearing annualrent, but revocable at pleasure.

In 1728 and 1731, Lady Jean borrowed from the Duke two sums, amounting to L. 750 Sterling, for which she granted bonds in the usual form, bearing annualrent and penalty.

Notwithstanding of these bonds, the Duke continued to pay to Lady Jean the full annualrent of the said 20,000 and 30,000 merks Scots, and an additional annuity of L. 161 Sterling, provided to her, as marked in the case betwixt Mr Haldane and the Duke, 15th February last, (*voce Quod Potuit non Fecit.*) to Whitsunday 1749, when he stopped payment.

Lady Jean being debtor to Mr Haldane in the sum of L. 500 Sterling, she assigned him to as much of the 20,000 merks bond as would pay that sum and annualrents thereof; and Mr Haldane brought an action against the Duke for payment.

Pleaded for the Duke; That Lady Jean was debtor to him in the sum of L. 750 Sterling and annualrents thereof since 1731, which extinguished the said bond of 20,000 merks, and made a balance due by Lady Jean to the Duke.

Answered for Mr Haldane; That, both by the civil and Scots law, compensation operates *ipso jure* from the date of the concurrence, at whatever time it be proponed; and therefore Lady Jean being first creditor to the Duke in 20,000 merks Scots, and in the 1731, becoming debtor to him in L. 750 Sterling, she from that period remained creditor to him only in L. 361 : 2 : 2½ Sterling, with the annualrent thereof. That such was the effect of compensation by the civil law, is certain from *L. 21. ff. de compensationibus*; and *L. 4. cod. eod.* which precisely determines the present question. The words are, 'Si constat pecuni- am invicem deberi, ipso jure pro soluto compensationem haberi oportet, ex

‘ eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejusque solius quod amplius apud alterum est usurae debentur.’ It is true that the defender must propone compensation, otherwise the Judge cannot know it; and so far it is *facti*: yet being proponed, the law determines the effect of it, which is altogether *juris*. See *Perezius ad codicem, tit. de compensat. n. 5. et Voet. Dict. tit. ff. n. 2.* And that compensation has the same effect by the law of Scotland, is the opinion of Sir George Mackenzie, *Inst. b. 3. tit. 4.* and of Lord Stair, *b. 1. tit. 18. § 6.* His Lordship says, ‘ Compensation is a kind of liberation, as being equivalent to payment; for thereby two liquid obligations do extinguish each other, *ipso jure*, and not only *ope exceptionis*; for albeit compensation cannot operate if it be not prepared, as neither can payment; yet both *perimunt obligationem ipso jure*, and therefore are not arbitrary to either party to propone or not propone as they please; but any third party having interest may propone the same, which they cannot hinder.’ The law so standing, the payments made by the Duke to his sister *ex gratia* beyond what he was debtor for, cannot alter the case, nor can he now demand back, or plead upon these payments which he gave her, as they must be considered as gifted; but the pursuer, in her right, is entitled to demand from the Duke the L. 361 Sterling which, in 1731, his Grace owed to his sister Lady Jean, above the sum compensated by Lady Jean’s bonds, and the annualrent thereof since Whitsunday 1749, when the Duke stopped payment.

Replied for the Duke; That by the law of Scotland, as appears from act 143d Parl. 1592, compensation is a defence on exception, which a defender may propone or not as he thinks proper; and when he propones it, it must be sustained in the manner he pleads it, and not according as the pursuer finds it most convenient for him. The concurrence of the debt due by Lady Jean to the Duke had no effect upon the bond of provision; both these debts subsisted; the Duke was debtor to her in 20,000 merks Scots, and she to him in L. 750 Sterling, and the Duke might have assigned away the L. 750; in which case he could not have pleaded compensation, but behaved to have paid the full 20,000 merks, after which Lady Jean behaved to have paid the L. 750 to the assignee. And seeing the Duke did not, till the commencement of this action, plead the compensation, but paid the full annualrent of the 20,000 merks, notwithstanding of Lady Jean’s being debtor to him in L. 750 Sterling, she and her assignee cannot now refuse to pay the sum in her bond and annualrents thereof, or to admit the compensation founded thereon.

‘ THE LORDS sustained the compensation proponed by the Duke of Douglas, upon the two bonds granted by Lady Jean to his Grace, both as to principal and interest due on the said bonds, to extinguish the bond in question for 20,000 merks and interest thereof,’

Act. *Advocatur.*Alt. R. *Craigie.*Clerk, *Kirkpatrick.*

B.

*Fol. Dic. v. 3. p. 151.**Fac. Col. No 85. p. 128.*

15 R 2

No 152.

1762. *February 10.* SMITH *against* DOUGLAS.

A bill had lain over for five years without diligence. It was found to have lost its privileges, so as not to exclude compensation against an onerous indorsee. See No 200. p. 1644.

. See The particulars in the Appendix relative to this title.

No 153.

1777. *July 16.* ELLIOT *against* M'KAY.

COMPENSATION was proponed against a bill in the hands of an onerous indorsee, which had lain over two years after its date, and 18 months after the term of payment without any demand being made, or diligence used. THE LORDS were of opinion, that the statute 12th Geo. III., ought to make an alteration of the former practice of the Court in such questions, and therefore they found that in the present case, compensation was not proponable. See No 205. p. 1648.

. See The particulars in the APPENDIX relative to this title.

1790. *December 8.*THE TRUSTEES OF JANE MARCHIONESS of Lothian *against* WILLIAM SIMPSON.

No 154.

Found, that a vassal was not entitled to retain feu-duties for damages occasioned by the working of a coal originally reserved to the superior, but afterwards sold by him.

IN 1748, the father of Mr Simpson obtained, from George Lord Ross, a feu-right of the lands of Pittendriech. The feu-duties were of considerable extent, amounting nearly to L. 150.

In the feu-right the following reservation appeared :

‘ But reserving to us, and our heirs and assignees, all and singular mines of gold, silver, copper, lead, coal, and other metals and minerals whatever, quarries of stone and lime only excepted, which are within the grounds of the lands before disposed, or any part thereof; and full power and liberty to us and our foresaids, now and at all times hereafter, to search for, work out, and dispose of, to our own use, all such metals and minerals, excepting stone and lime, as said is; and to make use of such part of the lands before disposed as shall be necessary for these ends; we and our foresaids always satisfying and paying the whole damages which the said Andrew Simpson and his foresaids shall sustain thereby, according as such damages shall be ascertained by two indifferent persons, of whom one to be chosen by us and foresaids, and the other by the said Andrew Simpson and his foresaids, as arbiters, or by an oversman to be chosen by the said arbiters.’

At the time when the feu-right was granted, and for several years after it, the coal was let by Lord Ross to tacksmen, with whom Mr Simpson's father settled his claim of damages in the manner prescribed.

The superiority of the lands, with the benefit of the reservation as to the minerals, having been transferred by Lord Ross to the late Marquis of Lothian, he, by his marriage-articles, provided his wife in a liferent of the whole.

Afterwards, with the consent of his Lady, the Marquis sold the coal to be found in these lands, to Mr Clerk of Eldin, under the same obligation as to damages that had been inserted in the original feu-contract.

The conveyance in favour of Mr Clerk was in the form of a subaltern infeftment, Mr Clerk paying, in name of blench-duty, one penny Sterling, *si petatur tantum*.

Between Mr Clerk and Mr Simpson's father several settlements took place with regard to the damages occasioned by the working of the coal. But in 1764, the parties having differed, a litigation ensued; which, in 1784, terminated in a decree of the Court of Session, by which Mr Clerk was found liable in damages and expenses.

Two years before this, however, Mr Simpson, his father being then dead, resolved to retain the feu-duties payable by him to the Marchioness of Lothian in virtue of her liferent-right, until the damages already ascertained, as well as those in the course of liquidation, were made good. These last, he alleged, would be very great, the ground on which his mansion-house and offices stood having been in some degree undermined.

An action for the feu-duties having been brought in 1788 against Mr Simpson, by certain Trustees appointed by the Marchioness of Lothian, he, in defence,

Pleaded, By the original feu-contract, Lord Ross became bound to repair the damages that might be sustained by the feuer, in working the coal. This was an essential part of the agreement; and the right of levying the feu-duties could not be exercised unless it was duly fulfilled.

When Lord Ross transferred his right of superiority, including that of working the coal, to the Marquis of Lothian, he at the same time communicated the burden originally annexed to it. Neither the Marquis himself, nor those who, in the character of lessees or feuers, had an authority from him, more or less permanent, could reap the benefit thence arising, without being subjected to the obligation of repairing the damages, the rule in all such cases being, '*Qui facit per alium, facit per se*.'

And the Marchioness of Lothian, in virtue of her liferent-right, as well as her Trustees, must stand precisely in the same situation. The obligation to pay the feu-duties, and that of securing an indemnification to the feuer for the losses arising from working the coal, are counter parts of each other; and he who demands that the obligations incumbent on the feuer shall be performed,

No 154. must show that there has been no delay in discharging those which the latter may lawfully require.

An absolute and unconditional transfer of the coal could not, without the consent of the feuer, relieve the superior from his engagements. A power of assigning in no instance is held to sanction such a proceeding. Thus, in the case of a lease, which is only distinguishable from a feu by the endurance of the right, the original lessee, even after an assignment, continues bound to the landlord. Erskine, 2. 6. 35.; Bank. 2. 9. 14. In the present case, however, there is no room for any reasoning of that sort; the right of working the coal, notwithstanding the subaltern infestment, still remaining attached to the superiority. Indeed the two rights are inseparable, as it is not in the power of a superior, by any deed not consented to by the vassal, to parcel out his right of superiority; 22d December 1774, Middleton *contra* Earl of Dunmore, *voce* PRESCRIPTION; 31st January 1781, Sir James Colquhoun *contra* The Duke of Montrose, *voce* MEMBER OF PARLIAMENT.

In the case of a reserved right of working a coal, an unlimited power of devolving on others the obligation to pay damages, would be singularly unjust. After repeated transmissions of that right, it would be impossible to ascertain in what manner the damages were to be made up by each successive owner of the coal; and after the coal was exhausted, there would be no opportunity of recovering damages, although the extent cannot be previously known or ascertained; so that, thus it might be in the power of the superior to obtain a decree of irritancy, *ob non solutum canonem*, when the vassal, in consequence of proceedings authorised by the superior himself, had been disabled from relieving his property. To these hardships it cannot be supposed, that it was in the view of the parties to subject the vassal; and there is nothing in the subsequent transactions that can authorise such a presumption. The purchaser of the coal having become bound to indemnify the feuer, it was natural that the feuer should, in the first place, endeavour to obtain his reparation from him: but from this it were unreasonable to infer, that the superior was released from his engagements.

Answered: The right of working a coal is not a part of the *dominium directum*, or superiority of the lands containing that mineral; otherwise the reservation which occurs in the feu-contract would have been unnecessary. It is a part of the *dominium utile*, and may be separated from the remaining parts, in the same manner as any one portion of the lands may be separated from another.

If both the right of superiority and that of working the coal had been conveyed away, it is evident, the obligation of indemnifying the feuer would have been transferred to the purchaser; in the same manner as the vassal, by selling the feu-lands, might have relieved himself from the future payment of the feu-duties. Nor can it make any difference, that in this instance the right of working the coal only has been sold, while the right of superiority is retain-

ed, those two estates, though once vested in one and the same person, being quite separate and independent of each other; and as it is the owner of the coal only who reaps any benefit from it, it is just that he alone should bear the correspondent burdens.

The intention of the parties in this case is sufficiently evident. The manner of ascertaining the damages as prescribed by the feu contract, as well as the various settlements and litigations which have ensued, to which the superior was no party, clearly show, that after the right of working the coal was transferred to another, he was to be no longer concerned in it. Such a transfer has already been made; the conveyance in favour of the purchaser of the coal, though in the form of a subaltern infeftment, completely divesting the superior, who, after the date of the sale, retained no authority over the coal, or the owner of it. To suppose, in such circumstances as these, that the feuer, instead of recovering the damages, as they occurred, from the party occasioning them, should have a power of throwing the loss on the superior; or that, under the colour of a security, he should have an opportunity of retaining those feu-duties which are due for the use of the lands; would be extremely unreasonable and unjust.

The Lord Ordinary, both on the general ground, and in respect of the specialties, found that Mr Simpson had no right to retain the feu-duties.

After advising a reclaiming petition, which was followed with answers, Mr Simpson having waved his claim of retention as to the damages already liquidated,

‘THE LORDS altered the Lord Ordinary’s interlocutor, and found, that Mr Simpson was entitled to retain the feu-duties stipulated in the original feu-contract entered into with Lord Ross, in security of any damage which he has sustained, or may sustain, by the reservation in that contract, of working the coal in Mr Simpson’s lands subsequent to the period when the damages were liquidated and awarded against Mr Clerk.’

A reclaiming petition was preferred for the Trustees of the Marchioness of Louthian, and answers were given in for Mr Simpson, after which a hearing in presence took place.

THE LORDS altered their former interlocutor, thus returning to that which had been pronounced by the Lord Ordinary.

Mr Simpson reclaimed; but the petition was refused without answers.

Lord Ordinary, *Dreghorn*.
Alt. Dean of Faculty, *Mut. Ross, Maconochie*.

Act. Solicitor-General, *Tait*.
Clerk, *Gordon*.

C.

Fol. Dic. v. 3. p. 150. Fac. Col. No 154. p. 307.

*** This case was appealed.

March 28. 1792.—THE HOUSE OF LORDS ORDERED, That the appeal be dismissed and the interlocutors therein complained of be affirmed.

1794. June 10. WALKER *against* TRUSTEES of DINGWALL.

No 155. THE LORDS found, That the purchaser of a ship, which was at sea at the time of the sale, claiming right to the freights from the date of the purchase, was not obliged to admit a claim of compensation on the part of the freighter, for a debt due to him by the former proprietor of the ship. *See* APPENDIX.

Fol. Dic. v. 3. p. 147.

Retention, that arises from the nature of a mutual contract.

See MUTUAL CONTRACT.

Retention against Tutors and Curators, and then Assignees *ante redditas rationes*.

See PAYMENT.

Retention by an Executor for debts due to himself. *See* PAYMENT.

Retention against a Factor's Assignee. *See* PAYMENT.

See Lee against Watson, *voce* PACTUM ILLICITUM.

See Kilcadron against Balgillo, Durie, p. 880. *voce* PERSONAL and TRANSMISSIBLE.

See No 35. p. 851.

See Crowdieknows against Creditors, D. Falconer, v. 1. p. 93. *voce* PAYMENT.

See BANKRUPT.—BILL OF EXCHANGE, Div. V.—DEBTOR and CREDITOR.—
APPENDIX.

COMPETENT.

SECT. I.

Decree cannot be done away except by Reduction.

1582. May.

DOUGLAS *against* MENZIES.

THERE was ane Douglas that desired to be *answered*, and to have letters conform upon suspension furth of the personage of Glasgow. It was *alleged* be David Menzies, minister, and also person of Glasgow, that the pursuer's decreet gift, and all that followed thereupon, was null of the self, because the aith that was given be Mr Archibald Douglas, person of Glasgow; and gif it was swa, it was null in the self, be reason of the acts of Parliament made anent the murder of the King's Majesty's Father and Regents, that whatsomever disposition, made be the committers of the said crime, *a die commissi criminis*, should be of no force nor effect, as into the Parliament LXXI. and the third act. And the said gift was of the date sen the commission of the said horrible crime, to the said Mr Archibald; and gif the said gift were otherways given *sede vacante*, the Regent had na power to doe the samen. To all this was *answered*, That the said gift of pension, with the Lords decreet past thairupon, could not be tane away be way of exception, but behoved to byde reduction, *et vice actionis agendum fuit*. And in respect that the persewar had been in possession be virtue of his decreet, the LORDS, after long reasoning, fand, be interloquitor, that in respect of the Lords decreet past upon, that the same could not be tane away be way of exception. *Bona pars dominorum in contraria fuerunt opinione* be reason of the act of Parliament foresaid, and that of another act of Parliament, whairin it was ordained, that nullities may come in be way of exception.

Fol. Dic. v. 1. p. 169. Colwill, MS. p. 146.

No 1.

Found that a decree of the Lords could not be taken away by exception, although pronounced manifestly against the act of Parliament, 1571, c. 36.

No 2.

1593. November 4.

A. against B.

A DECREET of an inferior Judge, pronounced upon the liquidation of prices, without probation, was found null without necessity of reduction. See APPENDIX.

Fol. Dic. v. 1. p. 169. Erskine, MS.

No 3.

A decree pronounced against a party absent *rei publicæ causa* was found not to be *ipso jure* null, but that it must abide the course of a reduction.

1594. November 26.

The EARL of MORTON against LORD FLEMING.

DECREETS given against a man subject to the proclamation, or absent *reip. causa*, are not so null of the law as that they may be taken away by exception, or summarily by a bill or summons upon six days, but must abide ordinary reduction, and continuation to try such things as consist *in facto*, as the proclamation, and the party's estate, and necessity to obey it, or his absence *reip. causa*, which consists *in facto*.

Fol. Dic. v. 1. p. 169. Haddington, MS. No 432.

No 4.

Decree of removing had been pronounced against a woman *veritas viro*. In a reduction of this decree, after her husband's death, she was allowed to plead defences competent, omitted in the original action, alleging, that the omissions of her husband, who had made appearance for her, ought not to prejudice her.

1605. June 19.

MILLER against SPANG.

In an action betwixt Miller and Provand, for reduction of a decret of removing, it was excepted by the defender, that he should be assoilzied from the second reason, because that this woman, now pursuer of the reduction, could not have been removed at the instance of the warner, because his father, to whom he was heir, had bound himself, by contract, to infest her in conjunct fee in the lands libelled, by virtue whereof she was in possession, and so could not be removed at the instance of the warner, who was heir and should warn. Against the which reason it was answered, That, notwithstanding thereof, his decret stood, and was lawfully given; because, it being proven *in foro contradictorio* against this woman compearing, she could never be heard to reduce upon an exception competent and omitted, she compearing. It was replied by the pursuer of the reduction, That if any ways she compeared in that first action of removing, her compearance was by a procuratory at command of her gude-man, she being then clothed with a husband, whose omission of a defence could not prejudice her without her own consent, no more than his alienation of her liferent without her consent: Otherwise, if it was permitted to husbands to compear and omit the just defences competent to the wife, when they could not induce the wives to sell their liferents, they would suffer them to be evioted by colluded decreets given against them, compearing and omitting their best defences; which could not prejudice her; but she now being so, had place to the said exception omitted, and not proponed in the first instance, as a relevant reason of reduction in the second instance. The matter being reasoned amongst

the LORDS, and almost the whole members inclining to find the reason relevant and competent in the second instance, I reasoned, on the contrary opinion, *ab inconvenienti* to the inconvenient proponed for the wives, because *rerum judicatarum auctoritas firma immutabilis esse debet*; and if this which is now libelled be admitted, and the exception founded upon the first decret of removing be repelled, it shall not be possible to any man to obtain any sure decret against any woman clothed with a husband; because, after that she have compeared, and defended, and vexed the party both with delays and all manner of defences in her husband's time; albeit decret be obtained against her *in foro contradictorio*, yet, after her husband's decease, she shall have place to reduce the decret upon reasons competent in the first instance, and omitted *per chance* wilfully to give occasion for more play; and so it shall not be possible to a man to obtain a certain decret, and unreduceable against a woman clothed with a husband; notwithstanding whereof the LORDS sustained the reason of the findings; the rather because it was founded upon the deed of the defender's father to whom he was heir.

Fol. Dic. v. 1. p. 169. Haddington, MS. No 826.*

No 4.

1628. *January 25.* KENNEDY against M'DOUGALL.

IN a suspension betwixt Kennedy and M'Dougall, Kennedy being decerned, as lawfully charged to enter heir to her father, to pay a debt of her father's, which decret was given against her, she compearing and offering to renounce to be heir; and a term being divers times assigned to her compearing to produce the said renunciation, and failing to do the same, she was decerned as lawfully charged *in foro contradictorio*, as said is. This decret was suspended, upon production of a renunciation to be heir, which renunciation the LORDS found might be received by way of suspension, notwithstanding of the foresaid decret given against her compearing, as said is, without any other process for reducing of that decret, seeing the suspender was then, at the giving of the sentence, and yet was, at the time of reasoning of the suspension, still minor.

Act. Nicolson.

Alt. Primerose.

Clerk, Scot.

Fol. Dic. v. 1. p. 169. Durie, p. 331.

No 5.

A decree against a minor, as lawfully charged to enter heir, being suspended upon production of a renunciation, the Lords found that this renunciation might yet be received by way of suspension without necessity of a reduction.

1632. *November 24.* HIND against L. WEDDERBURN.

ONE Hind pursues removing, as heir to his goodsire, who was infeft in some husband-lands in Coldinghame, against L. Wedderburn and his tenants; and he defending and excepting, that his father had obtained decret of removing against this pursuer's goodsire, to whom the pursuer is heir, by virtue of which decret his father, during his lifetime, and since this defender, hath been in con.

No 6.

A nullity proponed by way of reply, was refused to be sustained against a standing decree, altho'

15 S 2

* Lord Kames has mistaken the import of this case.

No 6.

the nullity was, that it proceeded upon an infestment of kirk lands not confirmed, which can produce neither action nor exception.

tinual peaceable possession of the lands libelled these thirty-four years by past ; therefore the pursuer, this decret standing, cannot pursue removing. And the pursuer *replying*, That the decret cannot be received to stay this removing, except that the defender would allege some right by virtue whereof he bruiks, and by virtue whereof the sentence was obtained ; which, if he will allege, he will oppone a nullity in law, viz. that it is an infestment of kirkland not confirmed, which can neither produce action nor exception. Likeas John Stuart, now Laird of Coldingham, and author of this pursuer's right, compeared and concurred with this pursuer, and adhered to this reply, and assisted the pursuit, against whom no decret is obtained.—THE LORDS found, in respect of the said decret, clothed with so long possession, obtained against this pursuer's goodsire, to whom he was heir, and pursued by him *boc titulo*, was standing unreduced, therefore that the pursuit could not be sustained, notwithstanding of the said reply of nullity, which is not receivable by exception or reply ; for it was not found necessary that the defender should except upon his right, so long as the said decret, clothed with so long possession, stood unreduced : And the LORDS respected not the superior's concurrence, to sustain a pursuit of removing at another party's instance, he not being pursuer.

Act. ———.

Alt. Nisolson.

Clerk, Scot.

Fol. Dic. v. I. p. 169. Durie, p. 652.

SECT. II.

Is Reduction requisite of Decrees of Apprising ?

1627. February 24.

COUPER against M^rMARTIN.

No 7.

The Lords refused to take away a standing comprising *ope exceptionis*, though it was for an heritable debt never made moveable by a charge.

WHEN comprisings are led against apparent heirs that will not enter, there must two charges be used, a general and a special. The first is *præparatoria actionis*, and is *contra personam* ; the last is *præparatoria executionis*, and is *contra fundum* : For the general charge is to make a man enter heir to his father, &c. that sicklike action may be had against him, as against his father, &c. and this makes the party, charged to enter heir, to come in place of his father, and is the ground of the sentence of registration, &c. following thereon. After the obtaining of a sentence against him, as lawfully charged to enter heir, then the special charge is used, charging him to enter to such and such lands, after which charge comprising followeth. And this order in charging must be kept in all comprisings ; so that the special charge cannot go before sentence be re-

covered against the party charged to enter heir, because it is a part of the execution of the sentence, which cannot precede the sentence itself. This was found between John M'Martin and Andrew Couper, who were striving upon priority of diligence, who should be first infeft by the Earl of Cassilis, superior of the lands which they had both comprised, wherein Andrew Couper's comprising being prior was not sustained, in respect he had used both the charges, viz. general and special, before the sentence, and so against the inviolable custom observed in such cases.

In the same action, Andrew Couper's comprising being challenged as null, because the ground of it was an heritable bond, never made moveable by a charge, (which was a plain nullity of the law, and took away the comprising *in solidum*;)—THE LORDS would not take away the comprising standing *ope exceptionis*, but found it behoved to be reduced.

The like found between the Lord Balmerino and Gilbert Elliot of Stobbs, 10th July 1634.

Fol. Dic. v. 1. p. 169. Spottiswood, p. 43.

1662. July 10.

JOHN KER against KER of Fernilee, and Others.

JOHN KER having granted a bond, whereupon he being charged to enter heir to several persons his predecessors, and having renounced, their lands were adjudged; John took assignation to the adjudication himself, and pursued the defenders for exhibition of the rights and evidents of the lands, and delivery thereof. The defender *alleged* absolvitor, *imo*, Because the pursuit being upon the pursuer's own bond, now again assigned to himself, *confusione tollitur obligatio*.

THE LORDS repelled this defence.

1do, Absolvitor, because the pursuer can have no interest upon these rights proceeding against him, as apparent heir to these predecessors, and now assigned to him, because there were other apparent heirs, specially condescended on, nearer of blood. The pursuer *answered*, *Non relevat*, to take away his infeftment, which behoved to be reduced. *2dly*, *Non competit* to the defenders, unless these nearer apparent heirs were compearing for their interest. The defender *replied*, That the infeftments having obtained no possession, and having proceeded only upon a charge to enter heir against the pursuer by collusion; it was competent by exception, seeing there was no service, nor possession, nor any thing done that the nearest heirs were obliged to know; and it was also competent to the defenders not to deliver the writs to any having no right thereto, they being liable to deliver them to the nearest heir of the true owner.

THE LORDS repelled this defence against the exhibition, reserving it to the delivery, in which they found it competent to the nearer appearing heirs, without reduction.

Fol. Dic. v. 1. p. 169. Stair, v. 1. p. 124.

No 7.

No 8.

An adjudication being challenged as following upon a charge to enter heir, the person charged not being the nearest heir, this was found competent to the nearer apparent heir without reduction, tho' infeftment had past upon the adjudication.

S E C T. III.

Is Reduction requisite of Decrees-dative ?

No 9.

1627. February 27.

ROSS *against* KELLIE.

A DEFUNCT's only child pursuing her stepmother as executrix, for her bairn's part, viz. the third of all, the LORDS sustained this action, although there was a standing confirmed testament, where the division was only made *bipartite* ; but they found no necessity of reduction here, because the daughter was not called to the said confirmation.

Fol. Dic. v. 1. p. 169.

* * * See The particulars of this case, No 2. p. 2366.

No 10.

1707. December 10.

JAMES LEES, Merchant in Glasgow, *against* ROBERT DINWOODIE, Merchant there

THE debtor of a defunct assoltized in a pursuit at the executor's instance, by compensation upon a debt due by him to the defunct, being reconvened on the same account by another executor, who offered to improve *incidenter*, the execution of the edict whereupon the first confirmation proceeded, the LORDS found, that the defender was not obliged to abide by the verity of the execution, and that improbation was not competent in that state of the process.

Fol. Dic. v. 1. p. 169.

* * * See The particulars of this case *voce* EXECUTOR.

1709. December 6.

JOHN HAMILTON of Bangour, *against* The LADY ORMISTOUN, SIR JOHN INGLIS and his SISTERS.

No 11.

A party being decerned executor-dative, *quæ* nearest of kin, when there was nearer, the Lords

IN the action at the instance of Bangour, as executor-dative *ad omnia, quæ* nearest of kin to Sir William Hamilton of Whitelaw, against the Lady Ormistoun, and her children of the first marriage, as debtors to the defunct, whose debts had been omitted in the principal testament confirmed by the Lady Houshill ;

Alleged for the defenders; The decret dative is null, and nō process can be sustained thereon; because, by the act 26th, Parl. 1690, none can be confirmed executors-dative to a defunct, but the relict, bairns, nearest of kin, or creditors: And the pursuer is neither creditor nor nearest of kin to him, William Dunlop his nephew being nearer.

Replied for the pursuer; 1st, The nearest of kin not having opposed the pursuer's being decerned dative *ad omissa*, it is *jus tertii* to the defenders, to found on the right of the nearest of kin. 2dly, The pursuer being heir to the defunct, and creditor to the executrix *qua* nearest of kin, for his relief of moveable debts, might, conform to the act 41st, Parl. 1695, obtain himself decerned executor-dative to the defunct, as if he were creditor to him; to the end he may have access to make effectual the goods and debts omitted by the principal executrix.

Duplied for the defenders; 1st, It is not *jus tertii* for them to object against the pursuer's title, in respect the nearest of kin compares and concurs. 2dly, The pretence that the pursuer is creditor for his relief, is nothing to the purpose, seeing that debt is not yet constituted; and titles which ought to be made up by legal diligence, are not to be made up by reply at the bar.

THE LORDS sustained process; in respect the pursuer's title of executor could not be quarrelled summarily before their Lordships by the nearest of kin; but he behoved to apply first to the Commissaries for reduction of the decret dative and preference.

Fol. Dic. v. 1. p. 169. Forbes, p. 361.

SECT. IV.

Reduction of Services of Heirs.

1626. July 22. M'CULLOCH *against* L. MERTON.

IN an action of declarator of bastardy, at the instance of M'Culloch *contra* L. Merton, the LORDS sustained an exception, founded upon the service of an heir to the alleged bastard, which service being a sentence standing, the LORDS sustained as sufficient to elide the gift of bastardy, and to exclude the King's right, so long as the said service stands untaken away, and which the LORDS so found, albeit the service was not retoured, nor past the chancellary; and which, albeit it should never be retoured, seeing the person served died shortly after the service; and so the pursuer *alleged*, that the said service not retoured ought not to elide this pursuit, the same being an imperfect and null writ, which would

No 11.

found that his title, in a process at his instance against the defunct's debtors, was not quarrelable summarily before the Lords by the nearest of kin comparing for his interest, but that he must first apply to the Commissaries for reduction of the decret dative and preference.

No 12.

An exception in a declarator of bastardy was sustained, being founded on the service of an heir to the alleged bastard, which being a standing sentence, the Lords found sufficient to elide the gift, so long as it stood unreduced; and this was found, altho' the service was not re-

No 12.

retoured nor past the chan-
cery, and al-
though it
should never
be retoured,
the person
having died
shortly after
the service.

never furnish action to him who was served, and which ought not to produce any benefit to him, and consequently ought not to furnish any argument in his favours against this pursuit; notwithstanding whereof the service was sustained, as said is.

Act. *Nicolson et Lawtie.*

Alt. *Aiton et Neilson.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 170. Durie, p. 224.

1627. February 16.

Lo. COLVILL against HERD.

No 13.

A brother re-
toured heir to
his father in
an annual-
rent, prefer-
red to his sister
who had been
retoured heir
to the same,
when he was
abroad, with-
out necessity
of reduction.

IN a suspension of the Lo. Colvill against Mr Walter Herd, who was resi-
denter, and dwelt with his family, in Vezon in France; and who, as served and
retoured heir to his said umquhile father, craved payment of an annualrent out
of the Lo. of Colvill's lands, wherein his said father died infeft; and against
Christian Herd, sister to the said Walter, who was retoured heir to her father, in
the same annualrent also, before the said Mr Walter's retour, and who had
thereupon obtained two sentences before the Lords against the suspenders; and
so the brother and sister craving the right thereof, the sister, in respect of her
prior retour standing, and sentences foresaid, which she alleged should give her
preference, while the same were reduced, seeing also she produced a note of a
sentence of excommunication against her brother for papistry, whereby she al-
leged, that he could enjoy no benefit within the kingdom; and the brother
contending, that seeing he was retoured heir, and had of the law the preference
to females, the excommunication should not debar him from his civil right, and
the right due to him by nature, seeing there was also produced for him a testi-
ficate subscribed from the Magistrates of that town where he remained, bearing
him yet to be living, and that he had wife and children begotten in lawful
matrimony;—THE LORDS, notwithstanding of the excommunication and prior
retours and sentences alleged for the sister, preferred the brother without neces-
sity of reduction; and found, that he ought to be answered in this right; and
if he was excommunicate, his right would accresce and pertain to the King, and
not to the sister, *eo casu*.

Act. *Primerose et Bruce.*

Alt. ———.

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 170. Durie, p. 276.

No 14.

A person was
retoured heir
to his grand-
father, and
charged the
superior to
enter him.
Found, that

1627. December 14.

BEG against The BAILIES of LANARK.

JOHN BEG being retoured heir in some lands in Lanark, as heir to his goodsire,
charges the Bailies of Lanark to infeft him therein, who suspend; and, in the
suspension, compares one Gemmil, and is admitted for his interest, and allegeth,

that the charger cannot be infest as heir to his goodsire, because his father was infest in the lands since his goodsire's infestment, which father had disposed the lands to this defender, who thereupon was infest therein, which writs he all produced; notwithstanding whereof, the LORDS found, that the Bailies ought to have given infestment to the charger, he being retoured heir; which retour standing, ought to receive obedience, for it might be that the father's sasine was false, or might fall for some just cause, which behoved to have its own trial, and could not be received *hoc loco* against the retour standing; but reserved the same *prout de jure* to be pursued by reduction, albeit it would have been a good defence, the time of the service, to have staid it.

Fol. Dic. v. 1. p. 170. Durie, p. 322.

1632. February 2. MUIRHEAD against LICHTON.

ONE Lichon, daughter to umquhile Lichon, being served and retoured heir to him, and as heir obtaining sentence, for delivery of her father's writs and evidents of his lands to her; and another being served and retoured as son and heir to the defunct, claiming the same, the daughter craving preference in respect of her sentence; and that she *alleged*, that her brother was dead before the service, and his alleged service was deduced only by a procurator, whose procuratory was only subscribed by a supposititious person, who was not truly that person, but called himself that man;—THE LORDS, notwithstanding of the decret, found, that if the son's procurators would offer to prove, that the son was on life the time of the service of him to be heir, which was deduced by an alleged procuratory, and not by his own personal compearance, that they would prefer him, that being proven, and admitted the same to their probation; and found no necessity to reduce the daughter's retour or decret; but found, that this trial should be received in this same place, without necessity of other process, or of any reduction.

Act. Sandilands.

Alt. ———.

Fol. Dic. v. 1. p. 170. Durie, p. 619.

1663. July 7. ISOBEL MOW against DUTCHESS of BUCCLEUGH.

THE said Isobel having served heir to William Mow her grandsire, charges the Dutchess, as superior, to receive her; she suspends, and compearance is made for certain persons, to whom the charger's father had disposed the lands in question, who raised reduction of the defender's retour and infestment, upon this reason, that the retour was null, serving the charger heir to her grandsire

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No 14.

the superior was bound to enter him, although an objection was offered by suspension, which would have stopped the service if previously offered.

No 15.

A daughter was served heir; and afterwards a service was, by procurator, expedited for a son. The daughter alleged the procuratory was false, and that the son was previously dead. Found, that if it could be proven he was alive, the service was good, without reduction of the daughter's.

No 16.

It was objected that a retour could not be done away by simple reduction, but that a sum-

No 16.

mons of error was requisite. Found that a retour may be simply reduced, unless the question depend on propinquity of blood.

as last vest and seased, whereas they produced the infeftments of their uncle and father, as heirs to their grand-sire in these lands; and therefore instructed that her grand-sire died not as last invest and seased, as of fee, but her father their author. It was *answered* for the charger, That the retour could not be taken away, *boc ordine*, by reduction, but behoved to be by a summons of error, for reducing the service by an inquest of error, to be pursued in Latin, by a precept out of the Chancellary. It was *replied*, That there needed no service of error, but the retour and infeftment might be reduced, unless there had been the question of propinquity of blood, of a nearer heir, which might have made the inquest an assize of error, which could not be in this case, seeing the inquest had done their duty, who produced one of the grandsire's sasines, found him to have died last vest and seased, as of fee, and neither could know, nor was obliged to know, that there was a posterior infeftment to the defender's uncle or father.

THE LORDS found the reduction receivable *boc ordine*.

Fol. Dic. v. 1. p. 170. Stair, v. 1. p. 196.

No 17.

A retour of a forfeited person was found not reducible unless by summons of error.

1667. *June 28.* SIR ALEXANDER HUME *against* CREDITORS of KELLO.

SIR ALEXANDER HUME being donatar to the forefaulture of John Hume of Kello, did obtain a warrant for retouring the said John, five years in possession of certain lands, before the forefaulture, but the inquest served negative; and now he pursues a reduction of the retour, on this reason, that it is contrary to the testimonies of the witnesses adduced. It was alleged no process, because the reduction of retours is only competent by a summons of error, in Latin, under the quarter seal. It was *answered*, That is only in the case where the assizers are insisted against for their error; and the constant custom of the Lords has been to sustain a summons of reduction before themselves of this method.

THE LORDS sustained the defence, and refused process, albeit it was known to them, that the custom has been contrary of a long time before.

Fol. Dic. v. 1. p. 170. Stair, v. 1. p. 466.

No 18.

A service of a younger brother, to which the elder was not made a party, found not to interrupt the service of the latter, altho' not reduced.

1677. *January 4.*

MITCHELSON *against* MITCHELSON.

A YOUNGER brother being served, before the Bailies of Kirkcaldie, heir of line to the immediate elder brother; thereafter the eldest brother did desire to be served heir of conquest to the same person; and the Bailies not being clear to proceed, in respect of the former service, unless it had been reduced; THE LORDS thought, That, upon their refusal, the elder brother may advocate for iniquity; and that the brieves may be served before the macers, and that the eldest brother being wronged by the foresaid service, to which he was not cal-

led, so that it was *res inter alios acta*, he ought not to be prejudged thereby, nor put to the trouble and charges of a reduction. No 18.

Clerk, Gibson.

Fol. Dic. v. 1. p. 171. Dirleton, No 416. p. 204.

1680. July 20.

A. against B.

No 19.

THE LORDS found a reduction of a retour might now be by an ordinary summons, and not by a precept furth of the Chancellery, in Latin, under the quarter seal; and, that the act of sederunt, mentioned by Durie 1633, was in desuetude. See APPENDIX.

Fol. Dic. v. 1. p. 170. Fountainhall, MS.

1688. July 26. Captain JOHN RAMSAY against GEORGE RAMSAY.

No 20.

CAPTAIN JOHN RAMSAY, immediate younger brother to the late Earl of Dalhousie, being abroad, his younger brother, George, serves himself tutor of law to the Earl's children. John returning home, and claiming his right, took out a brieve for serving himself tutor; whereon there is first an advocacy presented; and, being refused, a petition was given in to the Lords for George, the present tutor; whereon the Lords stopt the service, till both parties should be heard. And at a calling, it being *alleged, tutorem habenti tutor dari nequit*; and that George's gift standing, and being clad with long possession, it behoved to be reduced, and Captain John to prove that he was elder brother; the LORDS, considering that this was *notorium quod non eget probatione*, and that the tutory was *ipso jure* null, and needed no reduction, they summarily annulled it, and ordained John's brieve to go on.

Found that an erroneous service of a tutor at law might be summarily annulled without reduction.

On a new bill and hearing, it was *alleged*, That the Earl, in his testament, had made a nomination of tutors, and three a *quorum*; and there were three who actually now accepted, viz. Sir George M'Kenzie, Sir John Ramsay, and John Johnston of Poltoun; and Mr Moor, the Lady's brother, would also accept; though it was objected against him, that being an English-Irish he was incapable. But the act of the *post nati* made by King James VI. habilitated him. The Chancellor was so offended with Sir George, that it moved him to say, that when the King had ado with him, he always pretended either conscience or prior engagements. *Answered*, They could not accept now after six years cessation and negligence, and suffering one to enter tutor of law who had no right; and Sir John Ramsay had virtually renounced the office by acting as factor under him, and never making his compts yet, and so could not recur now. *Replied*, No prescription runs against tutors nominate, neither by the common law, l. 11. *D. de testamentar, tutel.* nor by our decisions; 17th December 1631,

No 20.

Auchterlony, *voce* TUTOR and PUPIL; and the other cases there cited: Whereas a tutor of law ought to claim his right within the year, which Captain John did not, and Sir John Ramsay could not accept alone till other two would act with him, and so he did not renounce; and he is responsible and most willing to compt. THE LORDS, much against the Chancellor's inclination, preferred the tutors-testamentar; in which the President was very zealous, seeing they designed to put him in the hands of his uncle, a papist, that the child might be bred at Doway. Instruments were taken by Captain John against the accepting tutors. *1mo*, That they may be liable for L. 200 Sterling of pension the Earl would get, if the King had the disposal of his education. *2do*, To be liable for all the prejudice he has sustained through their acceptance these six years bygone. But tutors nominate are only liable from the date of their acceptance; which, as I have observed *alibi*, is most unjust, and was only introduced by Gosford, in his cousin, Wedderburn of Kingennie's case with Scrimzeour. *See* TUTOR and PUPIL.

Fol. Dic. v. 1. p. 171. Fountainhall, v. 1. p. 515-

SECT. V.

Whether Reduction be requisite of Decrees Arbitral;—Of Legal Instruments;—Of Inhibitions;—Of a Deed executed by a Woman *vestita viro*;—Of a Decree of Preference in a Multiplepinding.

No 21.

Found that no exception of iniquity, nullity, &c. can be proponed against a decree-arbitral; a reduction only being competent.

1540. February 11.

HAMILTON *against* HAMILTON.

NA exceptionoun of iniquitie, nullitie, or uther quhatsumever, may be proponit or allegit contrare the executioun of ane decrete-arbitral lauchfullie given. But the proponer thair of sould use and allege the samin, be way of actioun, gif he pleisis, for reductioun and retractatioun of the said decrete.

Fol. Dic. v. 1. p. 171. Balfour, (ARBITRATION.) p. 415.

No 22.

A party producing an instrument of requisition, and the other party offering to prove directly the contrary of what was

1583. February.

EARL of CRAWFORD *against* OGILVIE.

THE Earl of Crawford warned Ogilvie of Beish to hear and see certain lands of, &c. to be lawfully redeemed, and consigned the soume of merks, together with ane letter of tack after the redemption of nineteen years, conform to the bond of reversion. The silver and the tack being produced before the Lords, it was *alleged*, That the tack was not the first tack that was consigned, but newly made and forged, and sua the first tack being uplifted after the con-

signation, made the redemption to be of no value, as likeways give the silver had been tane up again. It was *answered*, That albeit the said tack had been tane up again, now the same being presented before the Lords, *licet non idem fuit numero aut in judicio, tamen idem specie*; and so the party being no manner of way prejudged be that deed, the redemption ought to be found lawful. THE LORDS fand be interloquitor, that the production of the tack before the Lords albeit it was not *idem numero* was sufficient. The like being practised of before anent the procuratorie betwixt Mr Hepburn and the L. of Balbut. See REDEMPTION.

In the said action of redemption intended be the Earl of Crawford against Ogilvie, the consignment of the soume and tack being quarrelled, the Earl of Crawford produced ane instrument, subscribed be two notars, that he offered the silver and the tacks conform to the reversion to the party, providing he would renounce, and grant the lands to be lawfully redeemed. It was *alleged* be Ogilvie on the other part, that he offered him to prove, be authentic instruments under the subscription of the same notars, that he offered to take the silver and to renounce all right and title that he had to the lands, conform to the reversion in all points, *et sic fuerunt instrumenta in vicem derogatoria*. It was found be the LORDS, that they wald not admit any probation be another instrument that was derogatory to the first, but gif they wald improve, they wald hear the party. *Vide Bald. in l. Scripturæ de fide instrumentorum, ubi tractatur de constitu: scripturarum.*

Fol. Dic. v. 1. p. 173. Colvil, MS. p. 253.

1628. July 25.

STIRLING against PANTER and OGILVIE.

IN a reduction betwixt Stirling and Panter and Ogilvie, for reducing of an infestment, in respect of a preceding inhibition; the defender *alleging* the inhibition to be null, because the dwelling-place of the party prohibited to anailzie, whereat the inhibition was execute, was within a regality, where, conform to the 268th act 15 Parl. Ja. VI. the same should be execute at the head burgh of the regality; likeas, the same should be registrate in the registers of that regality, and this inhibition is neither execute, nor registrate there, but only at the market-cross of the head burgh of the sherifffdom, and registrate in the Sheriff-clerk's books; this allegiance was repelled, and the nullity foresaid was found, ought not to be received, by way of exception, but was reserved to the party, to be pursued by way of ordinary action of reduction, *prout de jure*. And thereafter, the defender *alleging* improbation of the inhibition, which being found relevant, the pursuer *alleged*, that seeing improbation was the last exception, which excluded the proponing of any other defence, therefore he *alleged*, that the defender could not thereafter be heard, to return to pursue any action of nullity against the writ. THE LORDS found, That notwithstanding the improbation, he might thereafter pursue the nullity, seeing

No 22.

therein inserted, and that by another instrument under the same notary's hand, the Lords refused to admit the same, and only reserved action of improbation.

No 23.

An inhibition being executed against a person living within a regality, not at the head burgh thereof, nor registered there, but at the head burgh of the shire, the Lords refused to receive the allegiance by way of exception; but reduction *prout de jure* was reserved to the party.

No 23.

the same nullity being in this same process proponed by way of exception, and found not to be admissable in this place by way of exception, but reserved by way of action, the party ought not to be prejudged, to insist thereon in an ordinary pursuit; albeit the pursuer *contended*, that the said improbation should either also be reserved by way of action, and not proponed in this place; or else, if the defender would propone the same here by way of exception, that thereby he did prejudice himself, and could not thereafter return to pursue upon the nullity thereof; which was repelled. This decision was stopped, and the cause ordained to be heard over again, and the same being reasoned, July ult. 1628, the nullity foresaid was received by way of exception, and admitted to the excipient's probation.

The like done in a declarator, Mr Alexander Burnet *contra* Lady Bonitoun, of her liferent escheat, March 10. 1637, where she first proponing a nullity againg the horning, viz. that she dwelt within another sheriffdom, than at the head burgh, whereof by the horning she was denounced, which was repelled *hoc loco*, and reserved to her to reduce thereupon; and, she thereafter proponing improbation, the Lords found this allegiance of improbation should not prejudice her, to pursue reduction, upon the ground of nullity, which was proponed by her, and was found not admissable, in this place, by way of exception against his pursuit. *See PROCESS—EXECUTION.*

Act. *Advocatus Hope & Nicolson.*Alt. *Stuart.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 172. Durie, p. 393.*

No 24.

An exception against a woman's bond, that it was granted in her widowhood, but after proclamation of her banns with a second husband, was found relevant, and received summarily, without necessity of reduction.

1633. *January 29.*SCOT *against* BROWN.

In a pursuit against one Scot and her Husband for his interest, for payment of L. 100 contained in a bond, given by her in her widowhood; the husband *alleging* the bond to be null, because it was given by this defender, now his wife, (albeit then a widow) yet it was granted after her banns of marriage with this defender the second husband were proclaimed publicly in the parish church, and marriage was compleated after the said proclamations were ended immediately, so that she could do no deed after that proclamation which might oblige her husband. This allegiance was found relevant, and received summarily against the bond, without necessity of reduction. *See HUSBAND and WIFE.*

Act. ———.

Alt. *Burnet.**Fol. Dic. v. 1. p. 174. Durie, p. 665.*

No 25.

A preferable creditor, though cited, neglecting to

1670. *February 1.*JAMES WATSON *against* AGNES SIMSON.

AGNES SIMSON being infest by umquhile Alexander Stewart, her husband, in liferent in an annualrent of L. 40 yearly out of the lands of Lamellethem, she,

in *anno* 1657, obtained a decret of poinding of the ground, and the tenants having suspended on multiplepoinding, calling her, and James Watson, and others, wherein she is preferred in *anno* 1666, to her annualrent, for all years by-gone and in time coming; in which decret of multiplepoinding, Watson was absent. Watson making use of the names of the tenants, does raise a second suspension, *anno* 1668, wherein he is called on the one part, and the said Agnes Simson on the other part; which now coming to be discussed, it was *alleged* for the said James Watson, That the decret of multiplepoinding against him, being in absence, he ought now to be heard upon his right, which is a public infestment, long before the liferenter's base infestment, or before it was clad with possession.—It was *answered*, That by the express act of Parliament anent double poindings, it is declared, that where parties are called, and compear not, but intent reduction of the decret, that they shall never be heard against the decret, or what the obtainers thereof have uplifted, unless they shew a sufficient cause of their absence; and that the obtainer of the decret shall only be obliged to answer the other party in the second instance, according to the right which is then competent in his person, and the obtainer of the decret shall have undoubted right to the mails and duties, ay and while he be warned at the instance of the other party, and better right shown, as is clear by the act of Parliament 1584, cap. 3.; so that Watson having yet raised no reduction of the decret of multiplepoinding, preferring Simson, but only a second suspension in name of the tenants who suspended before, the said Agnes Simson, her decret standing, and her right standing thereby, cannot be taken away, till in a reduction Watson produce a better right.—It was *answered*, That Watson does not contend for the years lifted by Simson, or for any years prior to his second suspension, albeit he does produce an unquestionable right, that would exclude her from all five, yet in regard of the act of Parliament, he is satisfied she be preferred for all years, till he in his second suspension produce his right; but alleges that he needs not raise reduction, because the act of Parliament does not require the same, but any complaint or process is thereby sufficient; neither does the ordinary course of law require a reduction of a decret in absence, but a suspension alone is sufficient; and if he be put to a reduction, his unquestionable right will be excluded for all years bygone, and ay and while he raise his reduction and produce his right.—It was *answered*, That albeit the ordinary course requires not reduction of decreets in absence, yet the act of Parliament requires the same, because in the narrative it expressly mentions, that the party absent in the double poinding uses to raise reduction; and in the statutory part it mentions, that the other party's complaint shall be heard in the second instance, which is always understood to be reduction or declarator, and in a second suspension.

THE LORDS found, That reduction was necessary to take away a decret of multiplepoinding in absence, and that a second suspension was not sufficient,

No 25.
appear in a multiplepoinding, another creditor obtained decret of preference. The preferable creditor raised a second suspension in the names of tenants. The Lords found, that it was not competent for him to quarrel the decree in this shape, but that he must necessarily insist in a reduction, according to act of Parliament. 1584, c. 3.

No 25.

and therefore preferred Simson, and found the letters orderly proceeded ; but prejudice to Watson to raise his reduction for the duties in time coming.

Fol. Dic. v. 1. p. 171. Stair, v. 1. p. 665.

SECT. VI.

Objections to Hornings, whether proponable by Exception.

No 26.

Found, that
a horning
cannot be
taken away
by exception.

1583. *July.*LOGAN *against* CARLILE.

THERE was ane Logan, who, having obtained the gift of the escheit of George Douglas of the Parkhead, pursued Michael Carlile for intromission with certain teinds pertaining to the said George.—It was *alleged* be the defender, That the horning whairupon the gift proceeded was null in the self, because it was execute, and he denounced rebel at the market cross of Edinburgh and Lanerig ; and truth it was, that he dwelt in the mean time in Kirthoril, and the said towns were not the head burghs of the shires whair he dwelt in the mean time, and swa conform to the last practice betwixt Angus and Home, *voce* EXECUTION, the said horning was null in the self ; and that he offered him to prove conform to his allegiance, that he dwelt in the mean time in Kirthoril.—To this was *answered*, That he could not now be heard to oppone his allegiance, be way of exception ; but the said horning ought to stand still quhill it were reduced *via actionis*, for otherways he would offer him to prove with the exception.—THE LORDS fand be interlocutor, That the horning could not be tane away be way of exception ; *licet nonnulli dominorum in contraria fuerunt opinione*, that it was *nullitas juris* and might, conform to the act of Parliament, be tane a-way be way of exception.

Fol. Dic. v. 1. p. 171. Colvill, MS. p. 236.

1590. *March.*COMMENDATOR of KILWINNING *against* LAIRD of BLAIR.

No 27.
Found as
above.

THE Commendator of Kilwinning being put to the horn be the Laird of Blair, his grand-father, the gift of his escheat for being year and day at the horn, was taken to his own son ; and upon the said gift they pursued for a declarator. Gavin Hamilton of Raplock having also obtained a gift of the Commendator's escheat and liferent, for being year and day at the horn, for some other cause,

persewit also to have an declarator upon his gift.—It was *alleged* be Gavin, who had the second gift, That the *hornings*, and *executions* thereof that were produced for the Commendator's son were null, because the letters and charges whairupon the executions of *horning* passed, were for the payment of ane minister's stipend, the whilk stipend was paid, and for that cause acquittance being produced, the letters were suspended, and so the cause being taken away whairupon the *horning* proceeded, the *horning* behoved to fall and be declared null.—To this was *answered*, That albeit the letters were suspended, yet there was no relaxation frae the *horning* standing. The King's Majesty had ay good cause to dispoise the escheat to the donatar, and the *horning* could never be tane away without a relaxation, but be way of action or reduction. The other party *alleged*, That the same in respect of the suspension might be taken away be exception.—THE LORDS found, That they would not take away the *horning* be way of exception.

Fol. Dic. v. 1. p. 171. Maitland, MS.

No 27.

1621. December 14. E. WINTOUN against —.

IN a declarator of escheat, pursued at the Earl of Wintoun's instance, against —, wherein it was *alleged* that the *horning* was null, seeing the party denounced, the time of the denunciation dwelt within the regality, and he not denounced at the head burgh of the regality; —THE LORDS repelled that nullity against the *horning* standing, and would not admit the same in that judgment, consisting *in facto*, and which could not be instantly verified, to stay the declarator; neither would in that judgment find it necessary to astrict the pursuer to prove that the rebel dwelt within the regality, in fortification of his *horning*, but prejudice to the party to reduce the *horning* upon that nullity, *prout de jure*.

Act. Hope.

Alt. —.

Clerk, Gibson.

Fol. Dic. v. 1. p. 171. Durie, p. 7.

No 28.

In a declarator of escheat, the Lords refused to receive, by way of exception, an *allegance*, that the party dwelt *alibi* at the time of the charge, than where the execution expressed; but it was reserved to reduce the *horning*.

1625. June 23. SOMMERVILL against GRANT.

HORNING found null upon an act of kirk-session for contribution to the school-master, because the party was not cited, nor consented not. This found by way of exception.

Fol. Dic. v. 1. p. 171. Kerse, MS. fol. 220.

No 29:

A *horning* found null by exception.

1626. November 29. L. SMETON *against* RELICT of SPIERS.

No 30.
A horning
found null by
exception.

IN a special declarator, at the instance of L. Smeton, donatar to the liferent of — Lidderdale of St Mary's Isle, against the relict of William Spiers, who was convened as intromissatrix with a debt of the rebel's ; — THE LORDS found an exception of nullity proponed against the horning, whereupon the general declarator was decerned, to be relevant, bearing, ' That the charge of that horning, was a charge to find caution of lawborrows ; ' likeas before the denunciation, and within the days of the charge, caution was found ; and he produced the act of caution, which was dated before the denunciation, the date of which denunciation was contained in the decret of general declarator ; in respect whereof, the same being instantly verified, the horning was found null, notwithstanding of the sentence of general declarator ; for this was proponed for a creditor, who was not called in the general declarator.

Act. Lawrie.

Alt. Foulis.

Clerk, Gibson.

Fol. Dic. v. 1. p. 172. Durie, p. 239.

1629. January 11. EARL of GALLOWAY *against* GORDON.

No 31.
Decided as
No 28. *supra*.

IN a declarator, pursued by the Earl of Galloway against Gordon, the defender offered to prove that he dwelt *alibi* the time of the charge, than where the executions did bear him to have then dwelt. — But the LORDS would not receive the allegiance by way of exception, but reserved his action thereanent for reduction of the horning thereupon.

Fol. Dic. v. 1. p. 171. Spottiswood, (HORNING.) p. 153.

1630. November 30. DOUGLAS *against* WARDLAW.

No 32.
In a declarator of escheat, it was found not enough to except that before denunciation the debt was paid and discharged, but the horning behoved to abide a reduction, to which the Officers of State must be called, because the

JAMES DOUGLAS, macer, being donatar to the escheat of Mr John Wardlaw, and pursuing declarator thereon, the defender *alleged*, That the horning was null, because, before the denunciation, the party had made payment of the sums charged for, so that thereafter he could not be lawfully denounced ; and the party having paid, he needed not have suspended, having in due time obeyed the charges. This exception was not received *hoc loco*, to stay the declarator, being proponed by way of exception, to take away a horning standing, summarily, which could not be taken away but by an ordinary action, whereto the King's Advocate and the party charger behoved to be called, and wherein trial must be taken upon the true date of the acquittance of payment, which is not proper in this process ; therefore action of reduction was reserved to the party upon that reason.

Clerk, Gibson.

Fol. Dic. v. 1. p. 171. Durie, p. 544.

* * Spottiswood reports the same case :

In a general declarator of an escheat, it being *alleged* that the horning is null, because before the charge, or denunciation at least, the debt was paid, and discharge thereof given by the creditor ; it will not be received, but the horning must abide a reduction, whereunto the King's Advocate and Treasurer must be called ; for otherwise the rebel and the creditor might collude together in prejudice of the fisk and the donatar, by granting a discharge antedated. Found betwixt James Douglas, council macer, and the Creditors of umquhile Mr John Wardlaw, whose escheat James was seeking to be declared.

Spottiswood, (ESCHEAT.) p. 104.

No 32.
rebel and creditors might collude in prejudice of the fisk, by antedating the discharge.

1662. July 22. WILLIAM MONTGOMERY *against* THEODORE MONTGOMERY.

WILLIAM MONTGOMERY, as donatar to the escheat of Theodore Montgomery, pursues a general and special declarator in one libel, and insists, first, in the general.—The defender *alleges* absolvitor, because the horning is null, the denunciation being at the cross of Edinburgh, where the defender had not his domicile. The pursuer opposed the horning standing, bearing, the defender to dwell in Edinburgh, and the horning could not be taken away by exception, *alibi*, not instantly verified.

THE LORDS repelled the defence, but prejudice of reduction thereupon.

Fol. Dic. v. 1. p. 171. Stair, v. 1. p. 132.

No 33.
Found in conformity with No 28. p. 2713. and No 31. p. 2714.

1712. June 18.

WILLIAM KER of Chatto *against* The CREDITORS of SIR WILLIAM SCOT of Elieston.

ROBERT SCOT of Elieston, succeeding to the estate of Harden, on the death of his brother Sir William ; and being much pressed both by his relict and creditors ; he prevailed with William Ker of Chatto to engage cautioner for him in considerable sums ; for relief whereof, the said Robert Scot gave him a disposition to his whole heritable and moveable debts ; and Chatto pursuing some of the debtors, comppearance is made for Scot of Wall, and other creditors to Sir William, who craved preference to these debts ; *imo*, Because they are creditors to Sir William the defunct, and Chatto is only creditor to Robert the apparent heir ; which is founded on the 24th act 1661 ; and the debts being originally due by Sir William, their debtor, and they having done diligence within three years of his disease, they were preferable to the creditors of the apparent heir.

No 34.
Decided likewise in conformity with the above mentioned cases.

No 34.

Answered for Chatto, that the act of Parliament did not concern him; for it only relates to real rights of lands, whereas his disposition was only of moveable bonds, but no ways extended to lands. *2do*, It was only introduced in favours of such creditors as within three years compleated their rights; whereas Wall and the other competitors had not yet brought their diligence the length of an adjudication, much less of an infeftment; and Stair, b. 2. tit. 12, expressly requires that the diligence be perfected within three years of the defunct's death.

Replied, There was no neglect nor *mora* on their part, of constituting their debt within the three years prescribed; but a *medium impedimentum* of an unforeseen accident, viz. Robert Scot of Harden's death, intervened within the three years, which put them to begin *de novo*; and the act does not speak of a complete right, being borrowed from the Roman *separatio bonorum hæredis a bonis defuncti*. THE LORDS found this case fell not under the said act 1661, it neither being an estate in land that was disposed, nor were their diligences perfected within the three years.

2do, Objected, That Chatto's disposition was from a brother-in-law, a conjunct person, and either *omnium bonorum* or very near to it, and so was null by the act of Parliament 1621, in competition with lawful creditors, unless the onerous cause thereof were otherwise instructed than by its own narrative. *Answered*, The act 1621 takes only place where the disposer is dyvor or bankrupt, which cannot be pretended against Robert Scot, who not only had his own estate of Elieston, but also the tailzied estate of Harden over and above all the subject he disposed to Chatto.

Replied, It is true, no man is hindered to dispose of his estate though gratuitously, if he have a sufficient affectable estate to pay his debt by the current of the Lords' decisions, viz. Clark *contra* Stewart, No 46. p. 917.; Mouswell's Creditors, No 60. p. 934.; and Mackell *contra* Jamieson, No 47. p. 920.: Yet by all these the Lords require it to be a clear solvent unincumbered estate, and not put creditors to expiscations and enquiries after uncertain funds, it being more just the debtor's near relations should fish out these than extraneous creditors. THE LORDS found Robert's disposition to Chatto reducible, unless he either instructed an antecedent onerous cause, or condescended on an estate free of incumbrances able to answer all the debts. *3tio*, Wall founded on a third ground of preference, that he had done more timely diligence by arrestment before the intimation of Chatto's assignation. *Answered*, No respect to the arrestment, being laid on for an heritable sum, which Stair shews was an incompetent diligence, unless made moveable by a charge of horning. THE LORDS found the disposition made after horning used against the said Robert Scot null. *4to, Objected*, They had the gift of the said Robert's escheat on a denunciation prior to Chatto's disposition. *Answered, 1mo*, The disposition being anterior to the gift, is preferable. *2do*, The denunciation is null, being at his country-house, and at Selkirk; whereas he was then living with his family at Edinburgh.

Replied, He had his *focum et larem*, his furniture and servants at Elieston; and his residence at Edinburgh was only occasional, prosecuting his law pleas with his

sister-in-law, &c. and so the horning is legally execute. THE LORDS repelled the nullity against the horning *boc ordine*, reserving Chatto's reduction thereof as accords. 5to, *Objected*, That Robert Scot having confirmed himself executor to Sir William, his brother, and found Chatto cautioner to make the inventory forthcoming, Robert could not dispoise these goods, nor Chatto validly accept a right thereto, in prejudice of Sir William's creditors, the executor being but a fiduciary trust for the creditors' behoof. *Answered*, He does not plead his disposition to liberate him of his cautionry, but only that he must be pursued *via ordinaria*; and then he would allege Robert Scot, the principal executor, his representatives must be first discussed, ere they come to the cautioner. THE LORDS found, though the executor may assign the inventory, yet if he do it to his own cautioner, he may be debarred *objectione personali* to make use of it to the creditors' prejudice; for *quem de evictione tenet actio eundem agentem multo magis repellit exceptio*. 6to, *Alleged* for Chatto, That this competition was most invidious and merely in emulation; for Wall was uncontrovertedly secured on Sir William Scot's estate, where he could not miss his payment; and yet most unnecessarily they would have no subject but the debts assigned to him, and *malitiis non est indulgendum*: And if they think he must pay, then he is content to do it on their assigning him to their securities. *Answered*, Though an assignation seem favourable and specious in some cases, yet here it is only sought to be a handle to vex Highchester, now Harden's heir, whose estate is tailzied under irritancies. THE LORDS thought it *jus tertii* to the creditors to found on the heir's interest; and that they ought to assign: yet because it had not been fully pled, they remitted it to be farther heard before the Ordinary.

Fol. Dic. v. 1. p. 171. Fountainball, v. 2. p. 739.

See HEIR APPARENT.—BANKRUPT.—EXECUTION.

SECT. VII.

Objections against a Standing Infestment how Proponable.

1612. January 31.

ARTHUR against L. of BLEBO.

AN apparent heir may reduce a decret given against him in an action concerning the heritage to which he is apparent heir. Sasine given to an heir upon his retour by that superior whose father was denuded many years before, by resignation of the superiority in the superior's hands, for infestment to be given to a conqessor, will not be taken away by way of exception or reply.

Fol. Dic. v. 1. p. 172. Haddington, v. 2. No 2380.

No 35.

A sasine given to an heir upon his retour, by a wrong superior, cannot be taken away by exception or reply.

No 36.

It being objected to a pursuer's infestment, that it was null, as proceeding upon a retour whereby the pursuer was served heir before a Sheriff, within whose jurisdiction the lands did not lie; this objection was not received by way of exception, but reserved to reduction.

1628. July 30.

MARTIN *against* BIRSS.

IN a reduction, Flora Martin *contra* Birss, for reducing of an infestment of two acres of land in Preston, the defender *alleged*, That the pursuer's sasine was null, because it proceeded upon a retour, whereby she is served heir to her father in the lands libelled, before the Sheriff of Edinburgh; albeit the lands lies in the constabulary of Haddinton, and so the service should have been deduced before that Judge, and not being so done, the retour was *a non suo iudice*, and therefore null *ope exceptionis*; this allegiance was repelled, and the nullity not received *hoc loco* by way of exception, seeing the same consisted *in facto*, and that the retour was not produced in this process, but only the sasine, which bore no such thing of the lying of the lands; and reserved action of reduction against the said retour, as accords.

Act. Mowat.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 1. p. 172. Durie, p. 395.

No 37.

An allegiance that a sasine is null, because the person signing as notary was never admitted regularly to that office, cannot be received in a multiple-poining, but must be pursued by way of action.

1634. June 26. LO. JOHNSTON *against* E. of QUEENSBERRY.

IN a double poining betwixt these parties, wherein the Earl producing a sasine for his right, the Lord Johnston *alleged* the same to be null, because it bore in the notary's subscription, to be written *aliena manu*, and it designed not by whom it was written, conform to the act of Parliament 1593; at least the user thereof should yet design the same, seeing he wanted the means of improbation, all the parties therein, and all the witnesses being dead, and the notary. *2do*, He *alleged*, it was null, because the fosesaid notary was never admitted notary, conform to the act of Parliament 1563, anent admissions of notaries, which provides instruments, given out by notaries not admitted, to be null; and this instrument is so, except the party will qualify that he was admitted conform to that act. Both these allegiances were repelled, for it was found unnecessary to design a writer of a sasine, and that sasines came not under the act of Parliament 1593; for these writs are not writs made by parties, as that act of Parliament means, but it is the act of the notary, and not of the party. And as to the second, THE LORDS found, that the party needed not in this judgment to offer to prove, that the notary was admitted conform to the act of Parliament, but reserved to the proposer to pursue that nullity by way of action thereupon, as accords of the law; so these two allegiances were found novelties to be proponed; and if they were received, might produce in all causes great delay, and trouble to parties, which were against reason to sustain.

Act. *Advocatus Regis et Nicolson.*Alt. *Stuart et Cunningham.*

Clerk, Scot.

Fol. Dic. v. 1. p. 172. Durie, p. 722.

S E C T. VIII.

In Possessory Actions, Replies against the Defender's Right are reserved till Reduction.—Objections against Rights Granted by Ecclesiastics how Proponable.

1623. December 11. CUNNINGHAM against AUSTIN.

IN an action of removing betwixt Cunningham and Austin, THE LORDS found an exception relevant, founded upon an heritable infeftment granted to the excipient of the lands libelled, proceeding upon a comprising; and would not astrict the defender to produce the comprising to dispute thereupon in this judgment of removing; but found the exception, bearing the defender to be heritably infeft, relevant; albeit it was *replied* by the pursuer, that the comprising, which is the ground of the infeftment, will appear null, if the same were produced, seeing it is deduced upon an heritable bond, never made moveable by requisition or any preceding charge, whereas the comprising could not be deduced, except the sum had been first made moveable: Which reply the LORDS would not discuss in that place, nor urge the defender to produce the comprising.

Act. Cunningham.

Alt. Russel.

Clerk, ———.

Fol. Dic. v. 1. p. 173. Durie, p. 90.

No 38.

In a removing this exception was found relevant, that the party was infeft upon a comprising; and the Lords refused to oblige the defender to produce the comprising, to dispute its sufficiency *hoc loco*, tho' it was alleged to be led for an heritable sum, not made moveable by requisition or otherwise.

1636. July 13. The BISHOP of EDINBURGH against BROWN.

THE Bishop of Edinburgh pursuing spuilzie against Gilbert Brown, and another defender, for the several teinds of their lands, and the said Gilbert Brown *alleging* a tack set to him by Mr. Gilbert Gordon of Shirms, as abbot of New Abbey, by virtue whereof he had been in possession these 40 years bygone, for payment of his tack-duty allenarly; and the Bishop *replying*, that the tack could not defend him, except he should allege that the setter was lawfully provided to the abbacy. THE LORDS found the allegiance relevant to defend the excipient in this judgment possessor, without prejudice to reduce thereon *prout de jure*; seeing it was not probable, that the tacksman could have the setter's provisions in his hands and keeping; but whensoever he should be pursued therefor, for annulling of his tack in an ordinary pursuit, he might then do his diligence to recover that provision, after what legal manner he best might, and upon his own peril. And sicklike it being *alleged* for another defender, that he had a feu-infeftment from another lawful titular of his lands, *cum decimis inclusis*, by virtue whereof he and his predecessors have been, past memory of man, in peaceable immemorial possession of these teinds, for payment of the duty contained in his feu; and produced his feu to prove the same; against which

No 39.

In a spuilzie of teinds, the defender excepted upon a current tack from an abbot. It was replied, that the tack is null, as set in diminution of the rental, against the act 1581. The Lords found, that this ought to abide reduction, and was not competent by way of exception.

No 39.

the Bishop *alleging* that the feu could not extend to the teinds, because the teinds were not disposed by the dispositive words of the charter; and albeit in the clause of *tenendas*, the words, *cum decimis*, were casten in among the words of that clause, yet being done either negligently by the writer, or cautelously put in with other words in the common stile, and so slipped into the clause *cum aucupationibus et venationibus*, &c. and albeit the same be also insert in the *reddendo*, which bore, *reddendo pro dictis terris, molendinis et decimis*, such a particular sum, yet whatever is in any of these clauses, not being contained in the dispositive words, as the teinds are not, nor yet the mills, therefore the feu cannot extend thereto; and the excipient opposing his feu, clothed with possession past memory of man, contended that the same was sufficient to defend him in this possessory judgment, ay, and while it were reduced; specially these teinds being of the vicar's lands, which teinds were never in use to be led, but go ever with the lands and possessors thereof, and no other person ever pretended right thereto;—THE LORDS found the exception relevant, to defend the excipient in this possessory judgment, and would not annul the feu in this place upon that allegiance, in respect the *reddendo* bore clearly, The duty to be paid for the teinds, which words *pro decimis* were expressly insert in that clause of the *reddendo*. *Item*, In this process it being *alleged* for the L. Lochnivar, that he had a tack set to him by the President, being then Abbot of New Abbey, for terms yet to run; and it being *replied*, that the tack is null, as set in diminution of the rental, against the act of Parliament 1581, seeing it was set for conversion of victual into silver, at a small price; THE LORDS found this nullity ought not to be received by way of exception, but ought to abide reduction; wherein it behoved to be libelled, that the teinds paid victual of old to the titular, and were so rentalled, against which the defender would be heard, and would have time to come instructed to defend himself, which in this place cannot be done.

Act. Nisbet.

Alt. Gilmore et McGill.

Clerk, Gibson.

Fol. Dic. v. 1. p. 172. Durie, p. 814.

SECT. IX.

Objections against the Executions of Messengers, how Proporable.

1581. February.

KING'S ADVOCATE and LADY KILSYTH *against* LAIRD OF WEDDERBURN.

No 40.
Found that
no allegiance

THE King's Advocate and the Lady Kilsyth persewed the L. of Wedderburu and John Hour of Cranston, for the deforcing of ane officer. It was *alleged* be

the L. of Wedderburn, That the officer of arms was not deforced, be reason that he offered him to prove that the goods, after the alleged away-taking of them frae the officer, were delivered to the Lady again be her own consent, and she content thairwith. To the which it was *answered*, it was contrare to the execution of the officer of arms; and the LORDS fand, that they wald admit na allegiance contrare to the execution of an officer, except they wald take to improve the same.

Fol. Dic. v. 1. p. 173. Colvill, MS. p. 130.

No 40.
plainly contrary to the execution of a messenger at arms, can be admitted, unless the party offer to improve the execution.

1667. June 4.

ZINZIAN against KINLOCH.

ZINZIAN, having poinded, pursued a spuilzie against Kinloch, having medled with some of the poinded goods: The time of the advising the cause, the defender offered to improve the poinding *in data*. THE LORDS repelled the defence *in hoc statu*, reserving action; in respect the poinding was produced *ab initio*; notwithstanding it was *alleged*, that the defence was *noviter veniens ad notitiam*; which the LORDS did not respect; because the poinding being produced *ab initio* (as said is), the defender should have tried and might have had the same information which he has now of the same. In the same process, though the prices of the goods spuilzied were not proven, because it is to be presumed that the prices contained in poindings are not too high, and the LORDS having considered the poinding, found the prices low.

Clerk, Hayston.

Fol. Dic. v. 1. p. 173. Dirleton, No 73. p. 30.

No 41.
An offer to improve a poinding *in data* repelled; and action reserved.

S E C T. X.

Improbation how Proponable.

1614. December 21. MONTEITH against CARMICHAEL.

IN an action betwixt Robert Monteith and William Carmichael, the LORDS sustained a decreet-arbitral, which was pronounced *in ipso termino* upon the day betwixt and the which the decreet should have been pronounced; and, in the same cause, the LORDS would not hear the said Robert Monteith to improve, by way of suspension, albeit he offered to improve the same by the oaths of the Judges, who were both present.

Fol. Dic. v. i. p. 173. Kerse, MS. Fol. 180.

No 42.
The LORDS refused to hear a party propone improbation of a decree-arbitral by way of suspension, though he offered to improve it by the oaths of the Judges, who were both present.

1632. *November 24.* ANNAND *against* ANNAND.

No 43.

An apparent heir proponing improbation against a bond, for payment of which he was pursued; it was found, that it could not be received *hoc loco*, the writ being registered, but action of improbation was reserved. This is the import of this case, and the two following compared together.

IN a pursuit by one Annand, as executor to his father, for payment of a sum against the defender, as lawfully charged to enter heir to his father, debtor of the sum, conform to his bond; the defender offering to renounce where he was convened as lawfully charged, &c. ; and, *2do*, alleging, under protestation, that he past not from his exception, and offer to renounce to be heir; that he offered to prove, by this pursuer's own oath, that the bond was blank in the sum all the time of the lifetime of the creditor, and was so found by this pursuer after his decease, and was since filled up by himself; and the pursuer *contending*, That he cannot be heard both to propone this exception and also to renounce; THE LORDS found, that if the defender would offer to renounce to be heir, he could not be heard to propone any other exception to elide the pursuit; and if he would propone any exception for eliding thereof, that *eo casu* he could never be heard, neither at that same time, nor in that process, nor in no time thereafter to renounce; and so they permitted to his option to elect any of the two; but found, that he could not propone and use both; for, if he succumbed in proving of the exception, or any other peremptory exception, which might elide the cause, he could not use the renunciation, having succumbed; albeit the renunciation was proponed at that time when the peremptor was proponed, which I think singular.

Act. Baird.

Alt. Gilmore.

Clerk, Gibbon.

*Fol. Dic. v. 1. p. 173. Durie, p. 653.*1633. *February 16.* KER *against* KER.

No 44.

Found as above.

JAMES KER having pursued Mark Ker for payment of a sum contained in a bond, which was registrate by compearance and consent of procurators, and he offering and taking a term to renounce, being charged to enter heir to the granter of the bond, and pursued *eo nomine*, it was found, that he might pass from that offer to renounce, and propone another exception, notwithstanding of that term assigned to him; and thereafter, he proponing improbation of the bond libelled, it was found, that this exception of improbation ought not to be received against a bond registrate, but reserved him action to pursue improbation thereon, albeit the registration was only by a naked consent, and that the clerk had the bond then ready, to be produced in this same process, being recently only done.

Clerk, Gibbon.

Fol. Dic. v. 1. p. 173. Durie, p. 675.

1637. *March 31.* VEITCH *against* M'DOUGALL.

KATHARINE VEITCH being pursued by Sir John M'Dougall to remove from the lands of ———, and she excepting upon her infestment of terce, whereto it was *replied*, That she had renounced the same; and she offering to improve that writ, the LORDS found, that improbation could not be received *hoc loco* by exception or duply, in respect the writ was registrate, and so ought to be pursued in an ordinary action of improbation; neither was it respected, that the defender *alleged*, that it was but registrate one day or two at the furthest, before the intending of this pursuit against her, who was but a poor woman, and who ought not to be put to pursue and intent a new process to improve, where the writ is but lately registrate, and done by the party of purpose to put her to further trouble. Likeas the clerk, in whose books the writ quarrelled is registrate, hath the principal ready to be produced, and likeways did produce the samen before the LORDS; notwithstanding whereof the LORDS found, that they could not receive the improbation *hoc ordine*, but only *per viam actionis*, seeing the writ was registrate a day before the intending of this action of removing.

Act. Craig.

Alt. Burnet.

Clerk, Gibson.

Fol. Dic. v. 1. p. 173. Durie, p. 844.

No 45.
Found as
above.

1665. *November 16.* WILLIAM DICKSON *against* JOHN HOME.

WILLIAM DICKSON having charged John Home upon a bond of L. 37 Scots, he suspends, and offers to improve the bond as not subscribed by him, but another John Home. It was *answered*, Improbation was not receivable, but in a réduction, or where the original writ was produced; but this bond was registrate in an inferior court, and the charger was not obliged to produce, nor was the clerk called.

THE LORDS, in respect the matter was of small importance, admitted the reason of improbation, the suspender consigning principal sum and annualrent; and declared they would modify a great penalty in case he succumbed; and ordained letters to be direct against the clerk of the inferior court to produce the principal.

Fol. Dic. v. 1. p. 173. Stair, v. 1. p. 309.

15 X 2

No 46.
In a matter
of small im-
portance, im-
probation of
a registered
bond was re-
ceived in a
suspension.

S E C T. XI.

Vis et Metus how Proponable.

No 47.

Metus may be proponed, not only by way of exception, but reply, and that against a third party, possessor of the thing extorted, but *qui metum intulit*, seeing it is *actio in rem scripta*.

1543. December 7. TENANTS of COCKBURNSPATH against LORD HOME.

IN causa spoliū intentati per tenentes de Colbrandspath *contra* Dominum Home et suum primo-genitum pro cunctis victualibus per ipsos ab iisdem spoliatis, *exceptum fuit* pro parte reorum quod actores renunciarunt sponte dictam actionem spoliū. Sed pars tenentium *replicaverunt*, Quod metu cadente in constantem virum per reos, eis relat. fecerunt dictam renunciationem. *Duplicatum* fuit pro Domino et Magistro de Home, Quod metus via exceptionis non esset hic admit-tendus; sed quod deberunt hunc tenentes agere per viam actionis quod metus causa ad retractandam renunciationem predict. *Triplicata* fuit, Quod per viam exceptionis vel replicæ metus opponi potest. DOMINI interlocuti sunt, de metu agere posse via exceptionis vel actionis ad libitum metum possi, juxta jura ff. quod metus causa, et de dolo mali et metus exceptione.

Fol. Dic. v. 1. p. 173. Sinclair, MS. p. 109.

No 48.

The contrary found.

1554. March 18. OLIPHANT against BOCHTIE.

ANENT the actione persewed be Sir David Oliphant against the Ladie Bochtie, for holding frae him an yearly annwell annaillziet to him be her husband with her consent; it was *alleged* be the said Ladie, That the land that paid the said annwell was her conjunct-fee; and, if she consented to the alienation thereof, it was for fear of her lyfe, and therefore she had just cause to with-hold the samen. It was *replied* be the said Sir David, That the said Lady sould not be heard to propone that exception, *per viam exceptionis, sed per viam reductionis*, whilk was admitted be the LORDS, and the said Lady's exception repelled.

Fol. Dic. v. 1. p. 173. Maitland, MS.

1591. June.

FORBES against TENANTS.

No 49.
Decided in conformity with No 47. *supra*.

FORBES of Monimusk wairnit certain tenants dwelling upon the lands and baronie of Monimusk, alleging them to be tenants to the Earl of Huntly, to flit and remove. The persewar producit, for his title to instruct his warning, ane retour and service, where he was retoured as nearest air to his father Mr Duncan Forbes in the said lands. It was *alleged* against the retour, That it

could give him no action ; because his umquhile father, to whom he was as nearest and lawful air retourit, renuncit all right, interest, and title, that he had to the said lands ; for the truth was, that the lands being wadset to him be the Earl of Huntly, and his brother, and Patrick Gordon, the lands were lawfully redeemit frae him, and he renuncit all right, title, and interest, that he had to the said lands. It was *replied*, and the persewar offered him to prove, That if any such renunciation was made, it was done *metus causa* ; and the persewar deduced the matter *cum variis circumstantiis metus qui potuit cadere in constantem virum*. It was *duplicated*, That he could not be heard by way of reply to allege *metum et quod metus causa fuit factum facta hac renunciatione et præcipue contra tertiam personam qui vim aut metum non intulit* whilk was the tenants : Nor yet could the persewar be heard to allege the same against the Earl of Huntly, his infeftments and renunciations standing unreduced. To this was *answerit*, That, conform to the law and daily practic, the exception, *quod metus causa*, will be ay refused be way of exception *et de jure*, prout in *L. quod metus causa est actio in rem scripta nec solum personam vim facient reducet, sed adversus omnes restitui velit quod metus causa gestum est* ; and the persewar, be way of reply, not only persewed the Earl of Huntly *qui vim et metum intulit*, but also the tenants and possessors of the ground.—THE LORDS fand be interlocutor, that *exceptio quod metus causa gestum fuit* might come in be way of exception or reply, conform to the act of Parliament, whereby nullities are ordained to come in by way of exception or reply, and therefore ordained the persewar to qualify his reply *quod metus causa* in writ, and the defenders to answer the same.

Fol. Dic. v. 1. p. 173. Colvil, MS. p. 459.

SECT. XII.

Irritancy how Proponable.

1629. January 29. STEVENSON against BARCLAY.

By contract between Robert Stevenson and Alexander Barclay, Robert disposed to Alexander a tenement in Strivling redeemable upon 1400 merks ; and, during the not redemption, Alexander set a back-tack to Robert for 140 merks yearly. Alexander, having caused registrate the contract, raised a charge of horning thereupon against Robert, which he suspended. The charge was, to enter him to the possession of the house disposed. The reason of suspension was upon the back-tack during the not redemption. To this *answered*, That

No 49.

No 50.

Found that a back-tack with a clause irritant of two years running in the third, could not be taken away by exception, but behoved to abide a declarator.

No 50. the back-tack was expired; in so far as it contained a clause irritant, if two terms should run in the third. *Replied*, This back-tack could not be taken away so, before it were declared expired. THE LORDS found it behoved to abide a declarator.

Fol. Dic. v. 1. p. 174. Spottiswood, (TACK) p. 327.

1631. June 29.

BOSWEL *against* TENANTS.

No 51.
In a case similar to the above, the Court found the pursuit of removing equivalent to a declarator of irritancy; the defender not offering to purge by payment of bygones.

DAVID BOSWEL of Auchinleck being heritably infest in the lands of Sundrum, by the Lord Cathcart, convened the tenants for payment of the farms thereof, for the years 1629 and 1630. *Alleged* by the Lord Cathcart, compearing for his interest, The tenants should not pay the duties to the pursuer, because any infestment he had, proceeded on a contract, containing a back-tack of the said lands during the not redemption of 8000 merks, for payment of 800 merks to the pursuer by the Lord Cathcart, in respect whereof the farms belong to him. *Replied*, That ought to be repelled, in respect the back-tack contains a clause irritant; that, if two terms should be unpaid together, the back-tack should expire, and it should be lawful to the pursuer to intromit with the saids duties, without any farther declarator.—THE LORDS repelled the exception in respect of the reply, and found the pursuit equivalent to a declarator; and this was because the defender never offered to purge the bygone failzie by payment of all that was owing.

Fol. Dic. v. 1. p. 174. Spottiswood, (TACK) p. 328.

No 52.

Declarator of the nullity of bonds to creditors by a fiar in tailzie sustained without a reduction.

1662. January 21. LAIRD BALVAIRD *against* CREDITORS of ANNANDALE.

THE LAIRD Balvaird, as heir of tailzie to David Viscount of Stormont, in the lands of Skun, pursues the heirs of line of the said David and Mungo Viscount of Stormont, and several their creditors; libelling, That, by an infestment of tailzie of the saids lands, made by the said David Viscount of Stormont, it is expressly declared and provided, that none of the heirs of tailzie shall do any deed prejudicial to the tailzie, or contract debt, whereby the tailzie may be altered, otherways the debt so contracted shall be null, and the contracter shall *ipso facto* lose his right of property, which shall belong to the nearest person of the tailzie; and subsumes that the late Earl of Annandale, last heir of tailzie, contracted debts which might affect the saids tailzied lands; and concludes, that it ought to be declared, that thereby he incurred the clauses irritant in the tailzie, and lost his right of property, and that all the bonds contracted by him, and appraised upon, are null, *quoad* these lands; and that the pursuer, as nearest heir of tailzie, may enter heir in these lands to David and Mungo Viscounts of Stormont, and enjoy the same free of any debt contracted since the tailzie.

The creditors *alleged* no process to annul their bonds and apprising *hoc ordine*, by way of declarator, but the pursuer must *via ordinaria* reduce; in which case the creditors will have terms granted them to produce the writs called for to be reduced; which privilege being in their favour, ought not to be taken from them in this extraordinary unformal way.—THE LORDS repelled the defence, and sustained the summons; in respect there was no bond craved to be produced, or simply reduced; but only that any bonds granted to the defenders since the tailzie are null, and all following thereupon, as to the lands in tailzie, which is no more than that they affect not the lands in the tailzie; and there is no necessity of reduction but where the writs must be produced before they can be reduced; and even in that case, if the pursuer satisfy the production himself, the defender hath no delay; and here the pursuer produces all that is necessary, and craves the rest to be declared null in consequence.

No 52.

THE LORDS sustained the summons.

Fol. Dic. v. 1. p. 174. Stair, v. 1. p. 85.

1666. November 7. THOMAS CANHAM against JAMES ADAMSON.

JAMES ADAMSON having disposed a tenement to Joseph Johnston, who married his daughter, in conjunct fee, and the heirs betwixt them, which failing, to divide between their other heirs; in the disposition there was expressly this clause, providing that the said Joseph, and his foresaids, make payment to the said James Adamson, or any he shall name, the sum of L. 600, wherein, if he failzie, the said right and disposition shall expire *ipso facto*. In the infeftment the former clause was repeated, but not the clause irritant. This Canham apprises the land from Joseph Johnston, upon Joseph's debt, and being infeft, did pursue James Adamson for removing, who, objecting the proviso, was notwithstanding decerned to remove. Now he pursues for the mails and duties during his occupation. James Adamson alleges that he ought to have the L. 600, because he had disposed with that provision. It was answered, This was but personal to pay, and could never oblige a singular successor; and all the pursuer could do was to proceed upon the clause irritant by way of declarator.

THE LORDS, in the end of the last session, having only seen the disposition containing the said clause, but not the infeftment, repelled the defence, but reserved the declarator; but now having seen, that the proviso of payment was in the infeftment, the cause being so favourable, a person disposing to his own daughter, and goodson, and the disponent yet in possession, they did, without multiplying further process, sustain it by exception.

Fol. Dic. v. 1. p. 174. Stair, v. 1. p. 464.

No 53.

A father having disposed a subject to his daughter under an irritancy; in this case, considered to be favourable for the disponent, the irritancy was allowed to be declared by exception.

1671. December 16. BLAIR *against* BROWN.

No 54.

In a removing, the tenant pleading on a current tack, the landlord replied, three years rent were due. He was allowed to amend his libel to that effect.

BLAIR pursues removing against his tenant, upon a warning, who excepts upon a tack standing. The pursuer *replies*, That there is more than three terms of the tack-duty resting, so that the defender must either remove, or find caution, and pay the by-gones. It was *answered*, That this was not competent by way of reply, but required a special action.

THE LORDS would not sustain it by way of reply; but if the pursuer would add that member to the same libel, the LORDS would sustain it without putting the pursuer to a new process.

Fol. Dic. v. 1. p. 174. Stair, v. 2. p. 26.

S E C T. XIII

Want of Consent of Curators how Propable.

1611. January 24. GILBERT MONCRIEFF *against* PATRICK CRAIG.

No 55.

A cautioner being charged upon a liquid bond, it was found competent by exception, that his subscribing as cautioner was null, being without his curator's consent.

HE who being minor, and having curators, became caution for a debt in a bond, the same being registered, and he charged, suspended upon the nullity of his bond in respect of his minority, and want of his curator's consent; the same will be found relevant; and because his minority cannot be proven instantly, and therefore he will get a term for probation of the reasons of his suspension.

Fol. Dic. v. 1. p. 175. Haddington, No 2114.

1621. December 7. CLERK *against* L. BALGONY.

No 56.

A minor was not allowed to propose, by way of exception, that he having curators had entered to his predecessors without their consent.

THE L. Balgony being pursued at the instance of one Clerk as heir to his father; and, for instructing of him to be heir, there was an service produced, against the which it was *alleged* for the Laird of Balgony, by Mr Andrew Ayton his procurator, That the same was null, being a service purchased by the defender, who was at that time minor, and as yet, and then having curators, without whose consent the service was deduced; and therefore it could not verify him to be heir.—THE LORDS repelled the allegiance, albeit it was offered instantly to be proven, in respect of the service standing, but prejudice to reduce the same, *prout de jure*.

Act. Baird.

Alt. Ayton.

Fol. Dic. v. 1. p. 174. Durie, p. 5.

1627. February 16. SIMPSON against L. BALGONY.

IN a transferring at the instance of David Simpson, burges of Dysart, against the Laird of Balgony, as heir to his father, the Lords found a service produced to verify the defender to be heir, to be sufficient, albeit it was not retoured to the chancellery, because it was used to prove *passive*; and also found the exception against the samen to be relevant *hoc loco*, without reduction or any other process, but to be received as a nullity by way of exception, viz. that the same was null, being a service done in his minority, without consent of his curators, he then having curators; which nullity was received *ope exceptionis*, albeit it was *alleged*, that it was a sentence which ought not to be reduced, because it was done to his utility, and by his own personal compearance the time of the service, which was repelled.

No 57.
Contrary to the above, a minor was allowed to propone, by way of exception, that he having curators, had entered to his predecessor without their consent, although he qualified no lesion thereby sustained.

Act. ———.

Alt. Ayton.

Clerk. Hay.

Fol. Dic. v. 1. p. 174. Durie, p. 277.

. Spottiswood reports the same case :

DAVID SIMPSON in Dysart having pursued a transferring against the Laird of Balgony, as heir served to his father; it was *alleged*, That his service was not lawful as done by himself, having curators, without their consent. *Replied*, That he ought to qualify some prejudice he sustained by entering heir to his father.—THE LORDS found the exception relevant of itself, *quia* of himself, *non potuit damnosam adiisse hereditatem*.

Spottiswood, (HEIRS.) p. 137.

. Auchinleck reports the same case :

THE Laird of Balgony being served heir to his father in his minority, without consent of his curators, the service was fund null by way of exception, because it was passive.

Auchinleck, MS. p. 2.

1628. July 9. VISCOUNT of STORMONT against LAIRD of DRUM.

Minor curatorem habens may annul a bond made to his hurt by way of suspension, producing his act of curatory, and taking a day to prove his minority.

Fol. Dic. v. 1. p. 174. Auchinleck, MS. p. 133.

No 58.
A bond granted by a minor, without his curators' consent, was found challengeable by way of exception.

1637. June 29.

L. LAMOND *against* MURRAY.

No 59.

The Lords found that the exception of minority, proposed by one, who, at granting the writ in controversy, was *in familia paterna*, was receivable without necessity of reduction.

THE LAIRD of Lamond, suspending the charges given by Donald Murray, upon an obligation granted him of 3000 merks, upon this reason, That at the time of the bond he was minor, and was then *in familia paterna*, and done without his consent, who in law is his administrator, and therefore was null; likeas he has intended reduction upon this same reason, which he produced in process. And the charger *answering*, That when his reduction is insisted upon, and ready for reasoning, he shall answer thereto; but by way of suspension, it is against the practice and reason, to receive this allegiance, it consisting *in facto*, to be tried so summarily, where it cannot be instantly verified, but must receive terms of probation; specially seeing he is content to find caution, to refund the money in case the suspender prevail in this reduction.—THE LORDS found, That they would receive this reason of minority to be discussed, and tried in this same place, by way of suspension, without necessity of further process in reduction, but declared, that they would assign only one term to prove the same, without prorogation of further diets, and therefore assigned a day to prove the reasons, at the which term the LORDS declared they would conclude the process and advise the cause, and would grant no more terms to prove.

Act. Gilmour.

Alt. —

Clerk, Scot.

Fol. Dic. v. 1. p. 175. Durie, p. 847.

1665. December 22.

SIR JOHN LESLIE *against* SINCLAR and DUN.

No 60.

Decided in conformity with the above.

SIR JOHN LESLIE, as assignee constitute by Sir William Dick, to a bond obliging Francis Sinclair as principal, and young Dun as cautioner, to deliver 30 chalders of bear, at 10 merks the boll, Dun *alleges* absolutor, because he was minor *in familia paterna*, and so his father was his curator of law, and therefore his subscribing as cautioner was null, being without his father's consent.—It was *answered*, The allegiance was not competent by exception, against a clear liquid bond; *secondly*, That the defence is only competent in the case of curators chosen.

THE LORDS found the defence competent by way of exception; but before answer to the relevancy, ordained the parties to condescend upon Dun's age the time of his subscription, and whether he did then administrate, or go about any other affairs. See MINOR.

Fol. Dic. v. 1. p. 175. Stair, v. 1. p. 329.

S E C T. XIV.

Minority and Lesion how Proponable.

1566. February 5.

CURRIE *against* LAIRD of GLENBERVIE.

IN an action pursewed be Walter Currie against the Laird of Glenbervie, for giving to him ane precept of sasine, according to ane charter, which the said Laird's father had given to Walter Currie's father; Glenbervie *objected*, That he was minor, being in the land the time of the giving of the said charter, and had revoked the same in due time. It was *replied*, That the charter should stand while it be reduced, nor that nullity could come in be way of exception. THE LORDS admitted the pursewar's allegiance, in respect of the reply, and discerned ane precept of sasine to be given, notwithstanding the defender's allegiance.

Fol. Dic. v. 1. p. 175. Maitland, MS. p. 227.

No 61.

A charter having been granted to a vassal, during the superior's minority, and this deed revoked in due time; yet the vassal pursuing afterwards for a sasine upon his charter, the Lords found the defence of minority and revocation not relevant *hoc loco*, and that the charter ought to stand till it be reduced.

1606. February 6.

COCKBURN *against* WOOD.

COCKBURN in Haddington, son and heir of umquhile James Cockburn, provost of Haddington, pursued one Wode for an annualrent, or for the mails of a house wherein he was infeft. It was *excepted*, That the defender should be assoilzied, because, if any infeftment, the pursuer or his umquhile father had, the same was redeemable, and was redeemed from this pursuer and his tutor, who renounced the same. It was *answered*, That a voluntary redemption granted by his tutor in his pupillarity could not prejudice the pursuer, unless decret of redemption had been orderly obtained; specially the pursuer being hurt, the sums alleged given for the said redemption not being employed to his utility and use. It was *answered*, That that lesion could not come in by way of reply, and he behoved to call his tutor for that lesion. In respect whereof, the LORDS found the summons not relevant, but in favour of the minor, gave him leave to mend his summons and qualify the lesion therein.

Fol. Dic. v. 1. p. 175. Haddington, MS. No 995.

15 Y 2

No 62.

A minor pursuing for the mails of a tenement, it was excepted that the said tenement was redeemed, and a renunciation granted by his tutor. The minor's reply, that no declarator of redemption was obtained, and that himself was lesed, because the price was not employed to his utility, found not receivable *hoc loco*, but that it behoved to be libelled.

1632. *January 27.*TAYLOR *against* HART.

No 63.

The Lords received minority and lesion by way of exception, the sum in question being only L. 80 Scots.

TAYLOR pursues Hart upon his bond. The defender *alleges* the bond was given by him for the price of a horse the time of his minority, as he was yet minor, without consent of his curators. It is *replied*, That this defence is not competent by way of exception, but the minor must reduce. THE LORDS, in respect of the sum, which was but L. 80, ordained the minor to allege his lesion, and received the same by way of exception.

January 31.—AND in the same cause, because the minor being a young man of 17 years of age, bought the horse in a market, and kept and used him, the LORDS repelled the exception of minority. *See* MINOR.

Fol. Dic. v. 1. p. 175. Auchinleck, MS. p. 136.

1665. *June 28.*ROBERT KEILL *against* JOHN SEATON.

No 64.

Minority and lesion is not competent by way of suspension or exception, but by way of action of reduction.

GEORGE SEATON as principal, and the said John Seaton his cautioner, having granted bond to Robert Keill, and being charged thereupon, both did suspend, and having alleged payment; they succumbed, and were decerned. John suspends again, and raises reduction upon minority and lesion. The charger *answered*, 1st, That this reason was competent and omitted in the former decret. 2dly, That proponing payment, did homologate the debt, as if an heir proponed payment, he would not be admitted to renounce thereafter, or to deny the passive title. The suspender *answered*, That the former process being in a suspension, nothing was competent but what was instantly verified, and so minority and lesion was not competent. The charger *answered*, That the decret of registration was turned into a libel, as being registrate at the assignee's instance, not having intimate during the cedent's life, and at that time the suspender had raised his reduction, and so it was competent. The suspender *answered*, That he was not obliged to insist in his reduction, and that the reasons thereof were not proper, even in an ordinary action, but only by a reduction. It was further *alleged*, that competent and omitted, took no place in suspensions.

THE LORDS had no regard to the last allegiance, but repelled the allegiance upon homologation, and upon competent and omitted, in respect that minority and lesion is neither competent by way of suspension nor exception, but by way of action of reduction, wherein the suspender was not obliged to insist.

Fol. Dic. v. 1. p. 175. Stair, v. 1. p. 289,

S E C T. XV.

Bankruptcy, how Proponable.

1663. June 19. GEORGE REID *against* THOMAS HARPER.

THESE parties competing in a double poinding, George Reid craved preference because he was assigned to the mails and duties by Thomas Mudie, heritor of the land.—Thomas Harper *alleged*, That he had arrested the duties upon a debt owing to him by William Mudie, father to the said Thomas, and any right Thomas had was fraudulent and null by exception, by the express words of the act of Parliament 1621, being betwixt father and son, without any onerous cause, and he ought not to be put to reduce *in re minima*, his debt being within L. 100.

THE LORDS found he behoved to reduce, conform to their constant custom in heritable rights..

Fol. Dic. v. 1. p. 172. Stair, v. 1. p. 192..

No 65.
A right by infestment, granted contrary to the act of Parliament 1621, cannot be challenged by exception, but by reduction.

1664. July 22. LORD LOURE *against* LADY CRAIG.

LORD LOURE being infest in the estate of Craig, pursues for mails and duties. Compareance is made for the Lady Craig, liferenter, who *alleges* she stands infest, and in possession of the lands.—The pursuer *answered*, That any infestment, as to that part thereof that was not for fulfilling of the contract of marriage, was fraudulent, and in prejudice of lawful creditors, and so null by exception, conform to the act of Parliament 1621.—It was *answered* for the Lady, They opponed the Lords' daily practice ever since the said act, that infestments were never taken away thereupon by exception or reply.

Which the LORDS found relevant.

Fol. Dic. v. 1. p. 172. Stair, v. 1. p. 222..

No 66.
Found as above.

1669. January 5. ISOBEL and MARGARET SIMES *against* MARION BROWN.

By contract of marriage betwixt umquhile Thomas Sime and Marion Brown, John Flowan, Marion's master, is obliged to pay 300 merks of tocher, and Thomas Sime is obliged to employ the said 300 merks, and 200 merks further for the said Marion, her liferent use. The said Thomas having two daughters,

No 67.
Though deeds, done in defraud of creditors, against the act 1621, re-

No 67.
gularly need
reduction,
yet in a per-
sonal right,
the matter
depending
before the
Lords, and
the parties
poor, such
a deed was
found simply
null.

Isobel and Margaret Simes, he lends a sum of 400 merks to Thomas Brown, and takes the bond on these terms, to be paid to him and the said Marion Brown, the longest liver of them two in liferent, and after their decease, to Margaret and Isobel Simes. The said Isobel and Margarét having pursued the said Marion before the Commissaries, for delivery of this bond, as belonging to them after their father's death, the Commissaries assoilzied the said Marion from delivery of the bond, and found it did belong to the said Marion herself, not only as to the annualrent, but as to the stock, because her husband having no other means but this bond, and not having fulfilled her contract, she had confirmed herself executrix creditrix in this sum, and behoved to exclude her husband's two daughters of a former marriage, who were provided, and foris-familiate before. Of this absolvitor the daughters raised a reduction on this reason, That this sum could not be confirmed, not being *in bonis defuncti*, the father being but liferenter, and the daughters fiars, and though they were but as heirs substitute, they exclude executors, and need no confirmation; *2dly*, The husband being but obliged to employ this tocher, and 200 merks more, the pursuer must instruct that the tocher was paid; *3dly*, The wife intromitted with as much of her husband's goods as would satisfy her provision.—It was *answered*, That the wife not being obliged for her tocher, but another party who was *solvendo*, and neither being obliged, nor in capacity to pursue, therefore could not now, after so long a time, be put to prove that the tocher was paid; and for her intromission she had confirmed and made faith, and the pursuers might take a dative *ad omissa*, if they pleased, but could not, *boc ordine*, reduce or stop her decret upon compearance.

THE LORDS found, That albeit in form the bond should have been reduced, as being done *in fraudem* of the wife, as being a creditor, and thereafter confirmed; yet now the matter being before the Lords, and the parties poor, they found the husband's substitution of two provided daughters by a former marriage null, as to the wife's provision, by the act of Parliament 1621, without necessity of reduction, the matter being but a personal right; and found the wife not obliged to instruct the tocher paid; and therefore assoilzied from the reduction, but prejudice to the pursuers to confirm, a dative *ad omissa*.

Fol. Dic. v. 1. p. 172. Stair, v. 1. p. 577.

No 68.

A disposition
to a conjunct
and confident
person, against
the act of Parlia-
ment 1621,
was found
null by excep-
tion, it being

1671. July 16.

BOWERS against COWPER.

BOWERS pursues the Lady Cowper, as vitious intromitter with the Lord Cowper's goods and gear, for payment of a debt of his; who *alleged* absolvitor, because she had a disposition from her husband of his moveables.—It was *replied*, That the disposition being between two most conjunct persons, without a cause onerous, was null by exception by the act of Parliament 1621, against fraudulent dispositions.—It was *answered*, That the disposition behoved at least to purge

the vitious intromission, and did stand ay and while it was redeemed; for notwithstanding of the tenor of the said act, the Lords did not sustain that nullity by way of exception or reply.

THE LORDS found the nullity competent by way of exception, it being no heritable right, requiring the production of authors' rights; but in respect of this colourable title, restricted the vitious intromission to the single value.

Fol. Dic. v. 1. p. 172. Stair, v. 1. p. 734.

No 68.

no heritable right requiring the production of the rights of authors.

1708. *January 10.*

The CREDITORS of JOHN DAVIE, Brewer, Competing.

THE said John finding his debts to exceed his effects and estate, either real or personal, he makes a disposition of the whole, in favours of his creditors, equally amongst them, conform to a list. John Watson, who has assigned his debt to John Philip, servant to the Earl of Seafield, Chancellor, being creditor to him by an heritable bond, in 1702, for 5000 merks, when the rumour of his breaking rises, he takes infestment thereon, on the 4th December 1704, and pursues a poinding of the ground, and, after some debate with the other creditors, there is a decreet preferring him, which was extracted on Christmas day last, of which there is a suspension offered, on these reasons; that it was surreptitiously and precipitantly given out, very soon after its reading in the minute-book, and after a scroll was demanded; and so craved to be reponed, and heard against the validity of that infestment; because, by the 5th act 1696, sasine taken on a disposition or heritable bond, though never so long prior, yet, if after his becoming bankrupt, is declared to give no preference; but *ita est* he was notourly insolvent, and *in meditatione fugæ*, and running to the Abbey for sanctuary, when this sasine was taken, and so must reduce on the said act.—*Answered*, That they opposed the act of regulations 1672, establishing competent and omitted in all decreets *in foro contradictorio*; and so it is, this was not proponed in the first instance, and consequently not receiveable now; and it had stood 24 hours in the minute-book after reading; and the being extracted on Yule day is no nullity. And *estō* they were reponed, yet the reason of reduction is noway relevant; for the said act 1696, fixing the marks, characters, and standard of a bankrupt, requires expressly horning and caption before the deed quarrelled, which cannot be subsumed in this case.—*Replied*, That, on the 3d of December 1704, the day before his taking the sasine, there is a warrant of imprisonment against him, at the instance of the Commissioners of Supply and Excise, for his deficiencies in brewing, conform to their power by the 14th act 1661, empowering them to quarter and imprison for the excise.—*Duplied*, This does not quadrate with the terms of the act 1696, which requires horning and caption, whereby creditors, by searching the registers, may find them; but this

No 69.

It was alleged in a suspension, at the instance of some creditors of a party *oberatur*, against another creditor, that he had taken sasine upon his heritable bond, after the debtor was become bankrupt. The Lords having refused to take in this allegiance by way of suspension or exception; and thereupon an executed declarator of bankruptcy being produced, and it being contended, that it should be reserved to come in *via ordinaria* by the course of the roll, yet the Lords received in the declarator *hoc ordine*.

No 69.

is a general warrant, where his name is foisted in amongst a hundred others, and can never satisfy the act of Parliament requiring horning and caption, which presupposes a previous charge.—*Triplied*, In a parallel case, No 113. p. 1006. between Man and the other creditors of Walls, the Lords sustained a caption on general letters for the excise of brandy, as sufficient to satisfy the act of Parliament, and this is as good.—THE LORDS refused the bill of suspension, and reasons of reduction on the act 1696, in regard there was no declarator depending thereon, and that it could not be received in summarily by way of suspension or exception; but an executed declarator of bankruptcy being produced, the LORDS received the declarator *hoc ordine*.

Fol. Dic. v. 1. p. 172. Fountainball, v. 2. p. 417.

S E C T. XVI.

Death-bed, how Proponable.

1666. *January 11.*GRISSEL SEATON and LAIRD of TOUCH *against* DUNDAS.

No 70.

In a pursuit against an heir for payment of a holograph bond, death-bed was found not competent by way of exception, but by reduction.

GRISSEL SEATOUN, and the Laird of Touch younger, her assignee, pursue — Dundas, as charged to enter heir to Mr Henry Mauld, for payment of a bond of 8000 merks granted to the said Grissel, by the said Mr Henry, her son. It was *alleged* that the bond was null, wanting witnesses. It was *replied*, That the pursuer offered him to prove it holograph. It was *duplied*, That albeit it were proven holograph, as to the body, yet it could not instruct its own date to have been any day before the day that Mr Henry died, and so being granted *in lecto aggritudinis*, cannot prejudice his heir, whereupon the defender has a reduction. It is *answered*, That the reduction is not seen, nor is there any title in the defender produced as heir. It was *answered*, That the nullity, as wanting witnesses, was competent by exception, and the duply, as being presumed to be *in lecto*, was but incident, and was not a defence, but a duply.

THE LORDS repelled the defence upon the nullity of the want of witnesses in respect of the reply, and found the duply not competent, *hoc ordine*, but only by reduction, and found there was no title produced in the reduction.

Fol. Dic. v. 1. p. 175. Stair, v. 1. p. 336.

1668. November 14.

CALDERWOOD *against* SHAW.

MARGARET CALDERWOOD being assigned to a bond granted by George Shaw, her deceased husband, for the sum of L. 220, did thereupon pursue Janet Shaw, as heir served and retoured to the said George, for payment thereof; which bond was holograph; and it being *alleged*, That holograph bonds do not prove against the heir *quoad datam*, and are null *ipso jure*, being presumed to be done upon death-bed; this allegiance was sustained, unless the pursuer would offer to prove that the bond was subscribed by the defunct before his sickness whereof he died; and that, notwithstanding it was *replied*, That holograph bonds are valid against the heir of the granter as well as against himself, and that it can only be objected by a third person that they do not prove *quoad datam*; and notwithstanding it was likewise *replied*, That they could not be sustained by way of exception, but by intending reduction.

Fol. Dic. v. 1. p. 175. Gosford, MS. p. 18.

No 71.

In a pursuit against an heir for payment of a bond, death-bed was found competent by way of exception.

SECT. XVII.

Exhaustion of Executry;—Challenge on the Head of Inhibition,
—how Proponable.

LORD BRUGHTON *against* AIRMAN.

AN executor confirmed, pursued for payment of soumes contracted for the husband, contained in a bond registered, she may except upon the exhausting of the goods and gear contained in the confirmed testament *et habens beneficium inventarii non tenetur ultra*; and although she have not decret of exoneration, the same may be proven by way of exception, by paying of particular sums whilk she paid upon decret recovered against her before ordinar judges.

Fol. Dic. v. 1. p. 175. Colvil, MS. p. 3.

No 72.

Found that exhausting may be proponed for an executor by way of exception, altho' he have no decree of exoneration.

1639. January 24.

INGLIS *against* BELL,

MARGARET INGLIS, relict of umquhile Alexander Douglas macer, pursues Patrick Bell, provost of Glasgow, as executor confirmed to James Inglis, who was the pursuer's debtor, for payment of the sums addebted to her by the said

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No 73.

A party sued an executor, who had intromitted be-

No 73.

yond what he
had given up
in testament.
Found not ne-
cessary for
the pursuer to
confirm *ad*
omissa.

James. And the said Patrick *alleging*, That the testament was totally exhausted by sentences, obtained by lawful creditors, to whom he had made payment; the pursuer *replying*, That the defender had intromitted with as much more of the defunct's goods as would pay her, by and attour the goods confirmed, and which she referred to his oath of verity *simpliciter*;—the defender *duplicated*, That an executor is not obliged *ultra vires inventarii*, and if he have intromitted with any further, the pursuer may take a dative *ad omissa*, whereupon being pursued, he will be answerable. THE LORDS repelled the allegiance in respect of the reply, which the LORDS sustained, specially being referred to the defender's own oath; and found no necessity that the pursuer should be put to take a dative *ad omissa*, but sustained the trial thereof in this same process to be proven, as said is. *See EXECUTOR.—SERVICE and CONFIRMATION.*

Fol. Dic. v. 1. p. 175. Durie, p. 870.

1674. July 23.

JOHNSTOUN *against* JOHNSTOUN.

No 74.

Inhibition
cannot be u-
sed by excep-
tion or reply,
but only by
way of reduc-
tion.

JOHNSTOUN of Elshiesheills having apprised the lands of Temple-land from Janet Johnstoun, as charged to enter heir to her goodsire his debtor, did thereupon pursue reduction of a wadset of the lands granted by her father to Johnstoun of Lockerby, and reduced the same as being a *non habente potestatem*, because her father granter thereof died, never being infest; he did also obtain decreets for mails and duties against Lockerby, who raised suspension of both decreets on this reason, that he had now, since these decreets, obtained a charter of confirmation of his former wadset from Janet Johnstoun, who was infest as heir to her goodsire, containing a precept for infesting him, whereupon he was infest before any infestment was taken by Elshiesheills upon his apprising, and being in the natural possession of the lands by the first reduced wadset, *eo momento*, that he was infest upon his new right, the same though base was clad with possession, and is prior and preferable to Lockerby's posterior public right on his apprising. It was *answered*, That the public right is preferable, the same having been in May, and the base infestment in March, both before Whitsunday, so that the base infestment could have no effect by lifting of the duties, till the term, before which the public infestment intervened, and Elshiesheills having obtained decreets of mails and duties against Lockerby, he became thereby in the civil possession. *2do, In re litigiosa* no new right granted by the common author voluntarily, can be preferred to the anterior diligence of a creditor; and so it hath always been found, that after denunciation of lands to be appraised, they become litigious, and no infestment upon a voluntary disposition, though prior to the infestment on the apprising, is preferable thereto, otherwise creditors' diligences might be altogether disappointed, and others preferred; and here the matter is not only litigious by apprising, but by decreets

of reduction and mails and duties. *3tin*, Elshiesheills hath used inhibition before Lockerby's new right, which though it cannot be made use of by exception, yet may be by reply, or in competition.

THE LORDS found that the inhibition could not be made use of without reduction; and found that the apprising did not make the subject litigious after denunciation, unless the appriser had proceeded in exact diligence to obtain infestment, or to charge the superior, but having delayed for a long time, they found the base infestment clad with natural possession, preferable to the public infestment, though both was before the term, and in this case the new infestment was not gratuitous or merely voluntary, because Janet Johnstoun who gave the same, was not only heir to her father, but also to her goodsire, who gave the first wadset. See LITIGIOUS.

Fol. Dic. v. 1. p. 175. Stuir, v. 2. p. 280.

SECT. XVIII.

Challenge on the Head of Interdiction, how Proponable.

1630. *March 17.* *SEMPILL against M'NISH and DOBIE.*

ONE M'Nish, son to umquhile Robert M'Nish, and Agnes Dobie his relict, executors confirmed to the said umquhile Robert, having obtained decret against John Sempill, for a sum owing by him to the defunct; and he suspending upon payment made to M'Nish, one of the executors, and producing his acquittance thereon; and the relict, who was co-executor, and had obtained the sentence with the other, *alleging*, that that discharge would only liberate the suspender of the one half of the sum, and that the other half was yet resting to her, seeing the one executor could not discharge but his own part; and the suspender *alleging*, That the acquittance, albeit granted only by one of the two executors, yet ought to liberate him of the whole debt, seeing he had paid, and might pay the whole debt to any one of them, and he needed not to be troubled in seeking them both, and to pay a part to ilk one of them, but they ought to compt amongst themselves anent their receipts, and the executors and the debtors ought not to be troubled with any thing, which was betwixt them; for ilk one of them having found caution in the testament, thereby the debtors ought to be found *in tuto*, and that they might lawfully pay the whole to any of them. THE LORDS found, That seeing two were confirmed executors, that payment

No 75.

The Lords refused to receive interdiction by way of exception or reply, but allowed the proposer to reduce.

No 75.

might be made to the one only, of the equal half of this debt, and would not sustain the discharge, given by one of the two executors, for the whole sum, but only to liberate of the half; and the rather this was found, seeing the decret for the debt was recovered at both their instances, and decerned payment to be made to them, not bearing conjunctly and severally. And it being further *alleged*, That the discharge should not liberate for that executor's own half, who gave the discharge, seeing he was interdicted for just causes, and which interdiction, with the publication thereof, was instantly verified. This was not received *boc loco* by way of exception and suspension, but reserved by way of reduction *prout de jure*. See SOLIDUM et PRO RATA.

Act. Mowat.

Alt. Lawrie.

Clerk, Scot.

Fol. Dic. v. 1. p. 175. Durie, p. 507.

* * This case is also reported by Spottiswood :

JOHN SEMPLE being addebted to Robert M'Nish in L. 200, Agnes Dobie his relict, and John M'Nish his son being co-executors to him, obtained a decret of registration against John Semple; whereupon the relict having charged, he suspended, because John M'Nish, one of the executors had given a discharge of the said sum to the suspender. *Answered*, Relevant for his own half, which he might discharge only, and not for the other executor's part. THE LORDS found, That there being more executors, a discharge granted to a debtor by one of them, will not liberate him at the other executor's hands for their parts. See SOLIDUM et PRO RATA.

Spottiswood, (EXECUTORS.) p. 121.

* * Auchinleck reports the same case :

THERE being two executors confirmed, one of them intromits with 8000 merks addebted to the defunct by one of his debtors, and gives to the debtor a discharge of the whole sum. The other executor charges for the whole. The debtor defends him by the discharge granted by the other executor. THE LORDS found the other executor could discharge for no more but his own part and half. See SOLIDUM et PRO RATA.

Auchinleck, MS. p. 75.

No 76.

1631. January 22.

HARDIE against M'CAULA.

Found incompetent to pronounce interdiction in a suspension, altho' the interdiction was

HARDIE being charged to make payment of a sum in a bond, suspended, that he was interdicted the time of the making thereof, and done without the consent of the interdictors, whereupon he had reduction ready to be discussed, and which interdiction was also known to the charger, at the granting of the bond,

and before. THE LORDS found the letters orderly proceeded, notwithstanding of the interdiction, and the party's knowledge thereof, in respect of the bond standing unreduced; but suspended the execution of the sentence to a certain day assigned to the suspender to do diligence, to obtain his reduction discussed.

Clerk, Hay.

Fol. Dic. v. 1. p. 175. Durie, p. 558.

No 76.
known to the
charger. But
time was al-
lowed to bring
a reduction.

1662. February 13. ROBERT LOCKHART *against* WILLIAM KENNEDY.

ROBERT LOCKHART pursues a declarator of the redemption of some lands, against William Kennedy of Achtefardel, who *alleged* absolvitor; because, before the order was used, the reversion was discharged, and the discharge registered. The pursuer *replied*, ought to be repelled, because the granter of the discharge was interdicted, before the granting thereof, and the same not granted with the interdictor's consent. The defender *answered*, *Non competit* by way of reply, but only by way of action of reduction, as is ordinary, in the case of inhibition and interdiction.

THE LORDS sustained the reply, in respect that it was not proponed, by defence to delay the pursuit, but by reply, which did only delay the pursuer himself; and also, that they thought it hard, to cause the pursuer quit his possession, and then go to a reduction.

Fol. Dic. v. 1. p. 175. Stair, v. 1. p. 98.

No 77.
Interdiction
may be pro-
poned by way
of reply.
This occa-
sions no delay
to the pun-
suer.

1671. June 20. THOMAS CRAWFORD *against* JAMES HALIBURTON.

THOMAS CRAWFORD having charged James Haliburton upon a decret-arbitral for payment of a sum; he suspends, and *alleges* that he was interdicted at that time, and that the interdictors did not consent to the submission, or decret-arbitral. The pursuer *answered*, *First*, That the allegiance was not competent by exception, but by reduction. *2dly*, That interdictions had only the same effect as inhibitions, and did operate nothing as to moveables, or personal execution, even by way of reduction.

Both which defences the LORDS found relevant. *See* INTERDICTION.

Fol. Dic. v. 1. p. 175. Stair, v. 1. p. 736.

No 78.
Interdiction
cannot be
proponed by
exception in
defence.

S E C T. XIX.

Turpis Causa;—Proof of the Tenor,—how Proponabe.

No 79.

In a reduction of a bond at the instance of the granter's heir; pleaded against the creditor, that he was only a name for a *pelle* of the deceast, consequently there was *turpis causa*.

Found that this, implicating a charge of adultery, could not be thus incidentally inquired into.

1624. February 18. FERNE against Captain WISHART'S HEIR.

IN an action betwixt the heir of umquhile Captain Wishart, and one Ferne, whereby a bond was desired to be registrate, at the instance of Ferne, against the heir foresaid, which bond was made to the said Ferne, by umquhile Captain Wishart, containing the sum of 1000 merks; against the which the defender using for an exception, his action of reduction of the said bond, and reasons thereof, viz. that the name of the creditor insert in the bond, was only borrowed, to the behoof of Katharine Leyes, who was concubine to the Captain, giver of the bond, with whom he conversed, and the same granted to her, he having then a married wife, and so the same being given *ob turpem causam et ut premium adulterii*, ought not to be sustained, to produce any action thereupon. THE LORDS found, That this defence and pursuit of reduction, tending to the trial and probation of a fact of adultery, was prejudicial, and in effect a precognition to a criminal pursuit, which might be moved against the woman, for adultery committed by her; which being moved before the Justices, this action preceding, might be a probation to the Justices, and assize, whereupon her life might be indamaged; and therefore found, that the trial of that turpitude could not be taken in this pursuit, or defence, which tended so prejudicially to the conviction of the party, and hazard of her life before the Justices; and consequently found no process, in the reduction, and repelled the defence of the alleged turpitude, while the same should be tried before some ordinary and competent judge.

Act. Aiton & Stuart.

Alt. Hope & Niselson.

Clerk, Gibson.

Fol. Dic. v. 1. p. 176. Durie, p. 112.

No 80.

In an improbation of the grounds and warrants of an inhibition *in re antiqua*, a proving of the tenor was re-

1701. June 12.

MEIN against DUNSE.

THE Lord Crocerig reported Mr Andrew Mein of Eastmoriston *contra* Mr Thomas Dunse of Graveldykes. Bell of Raccleugh, John Dunse, and Wilkieson of Eastmoriston, grant bond to John Sheill for L. 1200 in 1652; and Dunse having paid the debt in 1653, he took assignation thereto, and pursued the heirs of Wilkieson in 1662, and obtained a decret against them, whereon he served inhibition, and adjudged, and pursued for mails and duties. Mein acquires the

lands of Eastmoriston from Wilkieson, and being pursued in a reduction *ex capite inhibitionis* served prior to his right, he raises a reduction and improbation of the grounds and warrants of the inhibition; wherein Dunse, for satisfying the production, gives in the extract of the bond, bearing to be registrate in November 1652, and also an extract of the assignation. Mein insisting for certification against the principals, it was *alleged*, That *in re tam antiqua* no certification could be granted, seeing the bond was registrate 49 years ago, and much diligence had followed thereupon, and was never quarrelled during all that time; and for the *casus omissionis*, it might very probably fall by and miscarry in that time; and they had raised a proving of the tenor on the forementioned articles and adminicles. And in a circumstantiate case like this, an extract was sustained to stop a certification, 2d January 1675, observed both by Stair and Dirleton, Thoirs against Forbes of Tolquhoun, *voce* IMPROBATION. *Answered*, Improbations were the great security of the people, and extracts of personal bonds can never be sustained; for where they are not extant, law presumes they have been paid, retired and cancelled, which is all that uses to be done in such cases; as Stair, in his Institut. shews, part 4. anent proving of tenors, and Dirleton's *dubia juris*, *voce* TENORS;—and no regard to the raising of the tenor, for it was not done till the certification was craved; in which case, the Lords use not to regard them so as to stop certification, as was found in the late process Brown against Craw, *voce* TENOR. And for the decision, there was a homologation of the debt in that case which influenced the Lords, and it also stood suspended, so it noway meets: But there is a practique which makes for the pursuer, No 37. p. 1755. Fumerton *contra* Lutefoot, where an extract was refused, though the debt had attained possession.—THE LORDS thought it hard to refuse his proving of the tenor *hoc loco*, though he had been long in raising it; and, on the other hand, it was unreasonable to delay the pursuer of the improbation; therefore they declared they would receive the tenor *incidenter* in this same process, and hear them summarily on the relevancy of the adminicles, without farther delay. Some proposed to grant certification, and leave them to prosecute their tenor, as accords; others to supersede extracting of the certification till November next, that *medio tempore* they may insist in making up of the tenor; but the LORDS took the middle course betwixt these two. There was one circumstance which rendered this probation of the tenor the more suspect, that at the time when this bond was registrate in November 1652, the English Judges gave the party back the principal writ together with the extract, and it was not kept at the register, as is done now; and so the party is more answerable for its miscarrying when it was in his own custody, than he can be reasonably supposed to be in the other case; though in both he is bound to produce the principal, when called for by improbation.

No 80.
ceived *incidenter* in the same process.

Fol. Dic. v. 1. p. 176. Fountainball, v. 2. p. 113.

1712. June 26.

MR JAMES INGLIS *against* Dame MARGARET CHARTERIS and LORD ALEXANDER HAY, her Husband.

No 81.

It was objected against the proving of the tenor of a writ, that it was innovative and extinguished. The Lords repelled the objection *hoc loco*, reserving to the defender to be heard thereon in any action to be raised upon the decree of tenor, in case it should be obtained.

MR JAMES INGLIS of St Leonards pursues a proving the tenor of some writs against Dame Margaret Charteris, and Lord Alexander Hay of Lawfield her husband. The writs were an instrument of sasine of one Mr Patrick Kelly, taken on an heritable bond, granted by Mr Cornelius Inglis of Eastbarns in 1660, for 4600 merks to be lifted out of that part of these lands called Purvesdale. *Item*, A precept of *clare constat*, granted by Mr Patrick Inglis as superior, to Janet Kelly, daughter and heir to the said Mr Patrick Kelly. *Item*, A sasine following thereon. For astructing the tenor these adminicles are adduced: The extracts of the sasines out of the respective registers where they stand recorded: The heritable bond, their warrant: *Item*, A decret of pointing of the ground on these sasines; and a preference to the creditors of Eastbarns. *Alleged*, The documents were neither relevant, nor concluding; for, *1mo*, Though the principal sasines were produced, and on the clerk's table, (whereas here be only extracts) they are nowise probative, being merely the assertions of a notar, in whose power law never put the making up of real rights to lands; likeas, the precept of *clare constat* is null, not bearing the designation of the writer, though posterior to the 5th act 1681; for it only says, 'Wrote by one, servant to Archibald Nisbet,' without telling who this Nisbet was; and to condescend now that it was (Archibald Nisbet) writer to Signet, cannot be received, it being declared a nullity unsuppliable by the foresaid act. *2do*, The precept is given by Mr Patrick Inglis the debtor's apparent heir, and so is a passive title. *3tio*, It appears by Dr Oswald's oath, taken in this process, that the grounds of this debt were in the common debtor Mr Patrick's hands, and so *instrumentum apud debitorem* and presumed retired; though by a contrivance betwixt him and this pursuer, his brother, it was resolved to be kept up and revived, to debar true and lawful creditors. *Answered*, The adminicles produced were incontestably pregnant; for, though a sasine alone be not sufficient, yet, conjoined with other presumptions, it has been sustained as a good document. And as to the nullity in the *clare constat*, the designation seems abundantly to certify the writer; and *esto* it did not, yet being only in a step of the progress, and connection of the title, it is no way material: And as to the granter's being apparent heir, and colluding fraudulently with his brother, it is evident he did it by a singular title, viz. a base infestment clad with possession, preferable to the creditors' diligence: And it appears by a decision in Stair, Inglis *contra* the Tenants of Eastbarns, No 54. p. 1324. that he was upon that right preferred to Mr John Inglis of Cra-mond, an annualrenter infest in these same lands: And though it was *objected*, that he was not the true superior to give any precepts, he being denuded by ap-prisings and adjudications, yet this was repelled, seeing they were expired, and

he, within the legal, was not fully divested, but he might enter and receive the vassals.—THE LORDS found the tenor sufficiently made up by the writs produced; yet so as he behoved to take it as it stood, with the pretended nullity in the *clare constat*. And found the objections on the collusion, and its being retired, not competent against the tenor; but reserved them by way of reduction.

No 81.

Fol. Dic. v. 1. p. 176. Fountainball, v. 2. p. 744.

1713. July 7.

The CREDITORS of JAMES HAMILTON, younger of Orbistoun, *against* JAMES HAMILTON of Dalziel.

No 82.

Found as
above.

In a process at the instance of the Creditors of young Orbistoun against James Hamilton of Dalziel, and Others, for proving the tenor of a disposition granted by the deceased William Hamilton of Orbistoun, elder, to his only son;—THE LORDS repelled the allegiance proponed for the defenders, That the disposition, whereof the tenor was craved to be proved, was innovated by contract entered into at Cramond, betwixt old and young Orbistouns, *hoc loco*; reserving to the defenders to be heard thereon after the tenor is proved, and allowed them to give in a condescence of the qualifications, that the disposition was cancelled and retired by old Orbistoun, and to prove the same before answer.

Albeit it was *alleged* for the defenders, That if the writ, whereof the tenor is offered to be made up, hath been innovated and altered, a proving the tenor cannot proceed. Because, then the pursuers have no interest, and a party having no interest cannot pursue; action being *jus perseguendi quod sibi debetur*, not competent vagrantly to every person having a mind to insist, but only to such as can shew their interest in what is acclaimed. Nor is there any difference in this matter betwixt a proving of the tenor and other actions; on the contrary, proving of tenors being extraordinary remedies, are not to be admitted till every thing objected against the pursuer's interest be discussed. So in exhibitions *ad deliberandum* (which like this is a preparatory action for a separate process) it is a good defence, that the defunct was denuded, whereby the pursuer's interest ceased, and there can be no further step made till the import of that defence be tried. Every accessory process must be determined by the same rules as the principal process, if insisted in, would: *Finis dat formam negotio*, he that hath right to the end, hath right to the means that lead to it; and *e contra*, one that hath no right to the end, ought not to be admitted to use the means to attain what is the right of another: Consequently, what is relevant against the principal conclusion, is relevant against the accessory of proving the tenor. Were a renunciation of the disposition under young Orbistoun's hand produced, his creditors could not proceed in proving the tenor till the renunciation were discussed: Now, innovation hath the same effect in law, as a discharge or

No 82. renunciation; and the Lords are always in use to restrain humour of parties in putting others to unnecessary charges, by sustaining the common exception, *frustra probatur, &c.*

In respect, it was *answered* for the pursuer, That they are not obliged to plead their interest, or dispute the import of the pretended innovation, until their right instructing the same be complete, and in the field, which they are bringing in by proving the tenor; this regularly should meet with no opposition, being of the nature of a transferring *in statu quo*, prejudicial to no party: For if the writ, whereof the tenor is to be proved, was good and effectual, the party leased by accident should have it reintegrated by the assistance of justice; and if it was exceptionable, it will be so still after proving the tenor, and all defences against it entire. The instance of an exhibition *ad deliberandum*, is foreign to the purpose: For none can deliberate about a succession where there is nothing to succeed to. Whereas a person may justly prove the tenor of a writ though innovated; seeing innovated writs are not always extinct, but continue still good evidents with the burden of the innovation, February 5. 1675. Binnie *contra* Scot, *voce* INNOVATION. Again, a discharge or renunciation could not stop process of tenor; because, the tenor of writs may be proved for other effects than for obtaining implement or performance. Besides, a discharge is not the same with an innovation, the first being a direct extinction of a right, and the other an extinction implied only. The Brocard, *frustra probatur, &c.* is misapplied; for the pursuers, without any humour, decline to dispute the point of innovation, till they be *in pari casu* with the defenders, by having their right complete in their hands, which they are prosecuting upon their own charges, without any trouble or expense to the other party.

Fal. Dic. v. 1. p. 176. Forbes, p. 696.

SECT. XX.

Exceptions, Whether Proponable in *Cursu Diligentie*.

1611. February 19. FAIRLIE against LD. of BLAIR.

No 83.

An obligation was transferred *passive* against both heirs of line and tailzie, reserving the benefit of discussion and

A contract, whereby the old Laird of Blair was obliged to infest Fairlie of Over Minock, was decerned to be transferred against the heirs both of line and tailzie, without discussion, reserving their defences against the execution. In that cause it was found, that a charge to enter heir being raised and execute before year and day was sufficient, if the last day of the 40 was after year and day. It was found that a charge to enter heir, execute at the instance of a pur-

suer before he was heir, was sustained by his subsequent service, which was drawn back to the time of the charge. In that cause, the LORDS inclined that the burdens lying upon the tailzied lands, and the bonds to infest men in the property thereof, or annualrents furth of the same, should be born by the heir of tailzie succeeding to these lands. SERVICE OF HEIRS.—TAILZIE.

Fol. Dic. v. 1. p. 176. Haddington, v. 2. p. 2162.

No 83.
other ques-
tions *contra*
executionem.

1629. *January 15.*

L. CORSBIE *against* SHAW.

BRIEVES being impetrate by the Laird of Corsbie, for serving him heir to one of his predecessors, before the four macers, and the LORDS having joined four advocates with them, two nominated for the Laird of Corsbie, and two for Shaw, who compeared, and opponed the service; and being admitted for his interest therein, he being heritably infest in the lands, whereunto Corsbie craved to be served heir to that of his predecessor, who was infest therein; and he *alleging*, that that predecessor was a bastard, and so she could not have an heir, nor he be served as heir to him; and the assessors differing in judgment, and being of contrary opinions, and craving the Lords' advice therein, by their supplication given in for that effect, whereupon they being heard in presence of the Lords, the LORDS gave advice, that that allegiance should not stay the service; for they thought all that the exception of bastardy, by the 94th act of Parliament 6th Ja. IV, is ordained to be received against the service, ought to be understood of the bastardy of him, who impetrates the brief, and not of the predecessor, to whom the party desires to be served heir; specially in this case, and cases of antiquity, where the predecessor was deceased many years before, as in this case where he was dead fifty years before; for, if this exception of the predecessor's being bastard were received, it would be a way to stop all services.

No 84.
An exception
of the bas-
tardy of a
remote pre-
decessor, was
not received
to interrupt a
service.

Act. Craty.

Alt. Neilson.

Fol. Dic. v. 1. p. 177. Durie, p. 415.

1633. *July 16.*

LAWSON *against* SCOTT.

IN a transferring of a bond pursued by Mr John Lawson against Scott of Whitsleid, as heir to his father, it being *alleged*, That the pursuer had comprised certain lands and teinds for the same debt, and was in possession of some of the teinds comprised; the allegiance against the transferring was sustained, albeit it was *answered*, that it was only competent against the execution, but not in a transferring.

Fol. Dic. v. 1. p. 176. Spottiswood, (TRANSFERRING.) p. 342.

16 A 2

No 85.

No 86.

One personal creditor was found to have no right to propone defence against the constitution of the debt of another creditor.

1662. July 24.

ALEXANDER SHED *against* ROBERT GORDON and DAVID KILL.

ALEXANDER SHED pursues Robert Gordon pupil, as lawfully charged to enter heir to his father, to pay a debt of his father's. Compears David Kill, the pupil's uncle, who was tutor nominate to him, but refused to accept, and therefore shunned to propone any defence in the pupil's own name, least it should be an acceptance, or *gestio*; and therefore produced a bond of the defunct's and as creditor *alleged*, that he would not suffer his debtor's estate to be affected in his prejudice, and offered him to prove, that the debt pursued on was satisfied. The question was, Whether he had interest as creditor to propone this defence.

THE LORDS having considered the case amongst themselves, found that where creditors in this manner compeared, it is not competent to allow their defence, because it may delay the other creditors pursuing, so that a third creditor may be preferred in diligence; and therefore they repelled the defence *boc loco*, but declared that it should be receivable against the pursuer, whenever he should pursue for affecting any of the defunct's means or estate, in the same case as now.

Fol. Dic. v. 1. p. 176. Stair, v. 1. p. 134.

No 87.

In a general declarator of bastardy, it was objected that a defunct had obtained a legitimation from the King. It was answered, that legitimation, what effect it may have, cannot be disputed in the general declarator but must be reserved to the special, which was found relevant.

1669. February 19. KING'S ADVOCATE *against* CRAW.

THE King's Advocate pursues a declarator of the bastardy of one CRAW. It was *alleged* for the defenders, That the libel was not relevant, unless it had been condescended who was the bastard's mother, and offered to be proven, that she was never married to his father. It was *answered*, That not being married was a negative, and proved itself, unless the defenders condescended upon the father, and offered to prove married. The defender *answered*, if that was relevant, the most of all Scotland might be declared bastards, it being impossible after a considerable time, to instruct the solemnising of a marriage; but law and custom doth require, that at least it must be condescended on and instructed, that the defunct was holden and reputed bastard at the time of his death.

Which the LORDS found relevant.

And it being further *alleged*, That there was produced a legitimation taken by the bastard from the King, which did import his acknowledgement of being bastard, and was stronger than being holden and reputed bastard; it was *answered*, *non constat*, that the defunct took this legitimation, but some other might have done it in his name, without his warrand.

THE LORDS found the legitimation sufficient to instruct the bastardy.

No 87.

It was then *alleged*, That the legitimation denuded and excluded, the King not only giving power to the bastard to make testament, but to dispoise of his heritable rights, even on death-bed. It was *answered*, That whatever the stile of such gifts be, they are never extended to heritable rights, but only to a faculty to make testament, which bastards want by the law: but if the bastard made no testament, and did exhaust his moveables by universal or particular legacies, the executor nominate could only have the third, which follows the office, and the King would have the rest of the inventory not exhausted. *2dly*, All general declarators being summary, these debates are only competent in the special declarator.

THE LORDS repelled the defence *hoc loco*, and reserved the same to the special declarator.

Fol. Dic. v. 1. p. 177. Stair, v. 1. p. 609.

1673. February 3.

RIDDOCH against STUART.

No 88.

An exhibition *ad deliberandum*, pursued by an apparent heir, was sustained notwithstanding the defender offered to prove behaviour, unless the defence were instantly verified; for, the Lords will not allow a course of probation to stop an action of this nature.

JOHN RIDDOCH, as apparent heir to his good-sire, pursues an exhibition *ad deliberandum*, against Robert Stuart, who having proponed a defence, that the good-sire was denuded by a disposition in favours of the defender's author, and that he was obliged to produce no further than that disposition; that defence was repelled in respect of this reply, That the defender's author being the good-sire's second son, all rights made to him without exception ought to be exhibit, albeit real rights made to strangers were not to be exhibit *ad deliberandum*, under that pretence, to open all men's charter-chests. The defender now further *alleged*, That the pursuer could not now deliberate, because he had immixt himself by disposing the heritage.

THE LORDS refused to sustain this allegiance against the exhibition, unless it were instantly verified; and would not suffer a course of probation to run to stop an exhibition only *ad deliberandum*.

Fol. Dic. v. 1. p. 177. Stair, v. 2. p. 164.

1685. November.

NISBETS against SMITHS.

No 89.

A disposition of lands being granted without procuratory or precept; in a process against the heirs of the granter, for fulfilling the obligation.

MR ALEXANDER HERRIOT having granted a disposition of his lands of Brockhouse, to Agnes Nisbet his wife, and she having pursued Isobel and Esther Smiths, as representing the said Mr Alexander their uncle, upon the passive titles, for fulfilling of the disposition; *alleged* for the defenders, That they could not be obliged to fulfil, because the disposition was granted by the said Mr Alexander upon death-bed, upon which they had raised a reduction, which they now repeated. *Answered*, That the pursuer being in course of diligence for completing of her right, it cannot be stopt upon any such reduction, where-

No 89.
 contained in the disposition, to grant procuratory and precept, the defence that the deed was granted on death bed, was found not competent *in hoc statu*, but reserved till reduction.

of the reasons must abide probation ; as in the case of an adjudication upon the late act of Parliament, which will not be stopt upon any defence consisting *in facto*, that abides probation, unless the same be instantly verified ; but all other defences are reserved *contra executionem*, and the defenders have no prejudice ; for, if they prevail in the reduction, then the pursuer's diligence falls in consequence. THE LORDS repelled the defence, and decerned the defender to fulfil the disposition. But declared the obedience to the sentence should not prejudice the defenders in case they prevail in their reduction.

Fol. Dic. v. 1. p. 177. Sir P. Home, v. 2. No 725.

SECT. XXI.

In Competition, Pleas are receiveable by Exception, which otherwise would be Competent only by Reduction.

No 90.
 The Lords preferred a public infestment, though posterior, to a private one clothed with possession, because that which was public proceeded on a contract of marriage, and inhibition executed thereupon, before the other party was infest and had obtained possession ; and this was sustained by way of exception, in a pointing of the ground at the instance of the private infester, without any necessity found for the inhibitor to reduce.

1626. *March 3.*

LAW against LA. BALGONY.

LAW in Kirkaldy pursuing the Lady Balgony for pointing of the ground for an annualrent, wherein the pursuer was infest, to be holden of the L. Balgony, and which infestment was clad with possession diverse years, before the year for which the action was pursued ; the defender *alleged*, That he was infest by a public infestment, following upon a comprising ; which infestment and comprising, albeit it was posterior to the pursuer's right, yet the same depended upon a contract of marriage, whereby the author of the pursuer's right was obliged to provide the bairns of that marriage to a certain sum of money ; upon the which contract, inhibition was served at the instance of the Laird of Dury, father to the Lady Balgony, who was a special contractor with the L. of Balgony in that contract of marriage, and which inhibition was executed before the granting of the infestment by the L. of Balgony to the pursuer ; for not fulfilling of the which condition of the said contract by the L. Balgony, he being now deceased, the lands controverted desired to be pointed, were comprised by the eldest son of that marriage, in whose favours the said contract, anent the provision of the sums therein contained, was conceived, and upon which comprising he was publicly infest ; so the said comprising and infestment public, albeit posterior to the pursuer's right, ought to be drawn back to the said contract of marriage, in respect of the nature thereof, and favour by the law due to the same ; and in respect of the said inhibition before the pursuer's right, especially seeing now by virtue of the said public infestment the defender was in posses-

sion.—THE LORDS found this exception relevant, and preferred the public infeftment posterior to the pursuer's prior infeftment, in respect of the preceding contract of marriage, and inhibition executed before the pursuer's right and possession had, conform to the public right ; which exception, founded upon the prior inhibition, was received in this same judgment : And the LORDS found no necessity that the defender should be put to reduce the pursuer's right, upon the ground of that anterior inhibition, but received the same in this action ; albeit the pursuer replied, that his infeftment, clad with possession, could not be so summarily taken away by the said inhibition ; neither could the possession alleged by the defender be respected ; because the lands falling in ward by the decease of his author, and the ward being only expired this year controverted, whatever possession was acquired from the donatar of the ward, who was conjunct person, friend, and kinsman to the defenders, ought not to be respected in the pursuer's prejudice ; but the matter ought to be handled as if the parties were disputing before the ward fell ; at which time the pursuer was in actual possession of his annualrent ; which answer was not respected, but the public infeftment, contract, and inhibition, and possession, and exception proponed thereupon, were admitted, as said is.

Act. Hope & Baird.

Alt. Aiton.

Clerk, Gibson.

Fol. Dic. v. 1. p. 177. Durie, p. 188.

No 90.

1628. July 29.

MITCHELSON against KER.

IN this action, two comprisers, who were both infeft in the lands, contending for the mails and duties thereof ; and having convened the tenant therefor, and the last compriiser proponing nullity of the other party's comprising and infeftment, albeit prior to his ; which nullity, the LORDS finding was receiveable, *etiam hoc ordine*, without reduction, where none of the parties alleged possession, thereby to claim the benefit of a possessory judgment, but were in present dispute for the possession, that by virtue of their rights, he having the best right, might be authorised to possess, whereby the party against whom the nullity was proponed, was forced to allege possession by virtue of his right, and consequently that the nullity could not be received but by way of action, which possession he qualified, in so far as the tenant convened bruiked the land by his tolerance ; 2do, That the tenant and the said compriiser verbally agreed together, to pay to the said compriiser 20 shillings yearly for the said lands, and which duty the tenant had paid diverse years since his right ; neither of these qualifications was found relevant, viz. tolerance to bruik, which the LORDS found no possession in the compriiser's person, neither verbal setting, for 20 shillings each year, of land estimate yearly at 500 merks, which was to be suspected in a compriiser, who is presumed in law, if he had not intended fraud and prejudice to other

No 91.

In an action for mails and duties, two comprisers competing, who were both infeft, but neither had obtained possession, the Lords sustained a nullity proponed by the one against the other's comprising, by way of exception.

No 91. creditors, would not have set the land so far within the worth ; and so the nullity was received by way of exception, notwithstanding of the foresaid answer and qualification of possession.

Act. Craig.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 1. p. 177. Durie, p. 395.

1664. June 17. TULLIALLAN and CONDIE against CRAWFURD.

No 92.

A discharge which had been rejected in a suspension, but extract superseded to give time to instruct it ; not being instructed within the time, was not afterwards, when instructed, received in defence against a declarator of an apprising.

TULLIALLAN and CONDIE pursue a declarator of an apprising led against them, as satisfied and paid within the legal, by intromission, and as an article adduce a discharge of a part of the sum appraised. The defender *alleged*, That the allegiance was not now competent, because it was *res judicata*, before the Lords of Council and Session, in *anno* 1637, where the same allegiance being proponed in a suspension,

THE LORDS found not the same instructed, and therefore found the letters orderly proceeded, yet conditionally superseding execution of the decreet till such a day, that, in the mean time, if the same were instructed, the instructions should be received ; and nothing was produced during that time, so that it cannot be received more than 27 years thereafter to take away an apprising clad with long possession, and now in the person of a singular successor.

The pursuer *answered*, That his declarator, founded upon the said article, was most just and relevant, it being now evident, that the sum appraised for was paid in part ; and as for the point of formality, albeit in ordinary actions, where terms are assigned to prove, and so a competent time granted to search for writs, if certification be admitted regularly, it is valid, and yet, even in that case, the LORDS will repon, upon any singular accident, in a suspension, *ubi questio non est de jure, sed de executione*.

THE LORDS would not delay execution unless the reasons be instantly verified ; Yet *in petitione* will not take away the right.

THE LORDS sustained the defence, and would not sustain the foresaid article, in respect of the decreet *in foro contradictorio*, though, in a suspension here, there was no allegiance that the writs were new come to knowledge, or newly found, nor could be, because it was alleged in the decreet.

Stair, v. 1. p. 200.

1671. November 29. JUSTICE against BOYD.

No 93.

It was not found competent by exception, but

THERE being a wadset granted by Ludovick Keir to Dr Scot, the right of the wadset was appraised by John Boyd, who pursues the tenants for mails and duties. Compearance is made for Bailie Justice, deriving right from the reverser,

who *alleged* preference, because he offered to prove the wadset satisfied and extinct, in so far as it being burdened with a back-tack, the wadsetter, without consent or authority of law, had entered in possession, and his intromissions did exceed the whole sums of wadset, principal and annualrent.—It was *alleged*, That this allegiance not being founded upon any article in the contract of wadset, but upon an unwarrantable intromission of the pursuer's author, it is not receiveable by way of exception, but by action of declarator of the expiring of the wadset by satisfaction; for though the Lords have sustained the satisfaction of appraisings by exception or reply, they have never done so in wadsets.

THE LORDS found the defence not competent by way of exception.

Fol. Dic. v. 1. p. 177. Stair, v. 2. p. 13.

1683. *March 13.* SIR DAVID THOIRS *against* SIR ALEXANDER FORBES.

SIR DAVID THOIRS's action against Sir Alexander Forbes of Tolquhon is referred to Redford, to hear them on the reason of minority and lesion, through the disposition made by Tolquhon; and that being proven, then ordained them to compt and reckon together, anent the onerous adequate cause paid by Tolquhon for the same. *See IMPROBATION.*

December 20. 1683.—The case between Sir David Thoires advocate, and Sir Alexander Forbes of Tolquhon, being reported by Redford; the LORDS found, by the qualifications alleged on, That Tolquhon did act as pro-tutor, and therefore must have no more allowed for the gift of the ward, but what truly he paid for it to Sir William Purves, and grant diligence for citing Sir William Purves to depone what he did get therefor; as also ordain Tolquhon to depone thereanent: And find, That Tolquhon must compt for his intromissions with the rents of the ward-lands; and as to the article of the inventory of debts founded on by Tolquhon, to make up the onerous cause of his disposition, find it must be allowed to Tolquhon, as a debt to affect the minor, he instructing that he paid them out; which he doing, he is to have allowance thereof out of the rents of the lands uplifted by him; and if the rents do fall short, the minor is to be liable for the superplus; and remit to the Reporter to consider the instructions that the debts in the inventory are paid by Tolquhon, and to allow what he shall see instructed; and find, That Tolquhon's obligation to relieve the minor of his second brother's portion was a lesion, in respect he was not obliged to pay the debt; and find, That Tolquhon must compt and reckon notwithstanding of his defence founded on his expired comprising, in respect of the posterior transaction for the sum of 10,000 merks, which the LORDS allow him with the annualrents; though that transaction was never fulfilled to him, seeing he hath not obtained a declarator annulling it on that head.

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No 93.

by declarator, that a wadset was extinct by intromission.

No 94.

In a competition betwixt two creditors on an estate, the one founding on a base infestment of ward lands, and the other repeating a declarator of recognition he had against him, the Lords received the declarator even *hoc ordine*.

No 94.

Tolquhon gave in a bill against this interlocutor ; which being considered on the 2d January, and also heard then in presence ; the LORDS rectified it in some particulars ; finding him still pro-tutor to John Forbes, but refusing to allow Sir William Purves to depone ; but ordain Tolquhon to depone in presence of Sir William ; and grant diligence for citing Sir William to be present when he depones : And they sustained the list of the debts, in so far as Tolquhon can instruct that they were justly resting, and satisfied by him, to be an onerous cause of his disposition *pro tanto* : As likewise sustained the article of 6000 merks resting to the relict and children, to come *in computo* of the onerous cause, in respect they find that Tolquhon was not only obliged to relieve the minor, but also to pay it and retire discharges ; also sustained that article of 2000 merks, payable to the said John Forbes or his creditors, at the said John's ratification of the disposition, after his majority ; and allow Sir David the pursuer to defalk out of the said articles allowed to Tolquhon as the onerous cause, any intromission had by Tolquhon with the mails and duties of the lands, and other goods which did belong to John Forbes, before the disposition ; and grant a mutual probation to both parties to prove the rents of the lands, and the price that such lands did then give in that country ; and remit to the Lord Reporter to make the compt and to report, to the effect the Lords may find and consider, whether there was a lesion to the minor by the bargain and disposition or not ; and find Tolquhon cannot exclude the pursuer by the expired comprising, in respect of the minute whereby he hath transacted and restricted it to the sum of 10,000 merks ; as to which sum of 10,000 merks, with the interest thereof since the date of the minute, they sustain the comprising as yet current, and redeemable for that sum.

December 24. 1684.—Sir David Thoires's action against Sir Alexander Forbes of Tolquhon, was called ; and it being *alleged*, That Patrick Forbes, Sir David's author, did represent his father, who entered into the minute with Tolquhon, because he intromitted, and yet could not ascribe the title of his possession to the comprising, because he had not entered *via juris*, by pursuing for mails and duties on the said comprising ; THE LORDS, before answer, ordained the said apprising, and other papers, to be produced.

March 17. 1685.—In the debate betwixt Sir Alexander Forbes of Tolquhon and Sir David Thoires, mentioned 24th December 1684, Tolquhon founding on a base infeftment of ward lands, Sir David repeated a declarator of recognition he had against him on that head.—*Answered*, Tolquhon must be preferred *hoc loco*, reserving to Sir David to insist in his recognition as accords.—THE LORDS received it *hoc ordine*.—Then Tolquhon *alleged* against it, That there was no recognition incurred ; because the base infeftment flowed upon a disposition from a goodsire to his grandchild by his daughter, who was *alioqui succesorus*.—*Answered*, He had three daughters, heirs-portioners, and this was but

the son of one of them, and so it would at least recognise *quoad* two parts.—*Replied*, By a public tailzie, Patrick Forbes had provided these lands to the eldest son of the eldest daughter; which the Lords found relevant.—Then having advised the oaths of Irvine of Arnage and Bailie Drum, anent the extinction and payment of the comprising of Sir David's author by the common debtor's means; though Sir David *alleged*, *1mo*, That the cedent's oath could not militate against assignees; *2do*, *Multo minus* after they were denuded; they waved that point, and found Tolquhon behoved first to be paid off the 10,000 merks, to which, by the minute, he had restricted his comprising, as mentioned *supra*.

June 15. 1688.—Sir David Thoirs's and Sir Alexander Forbes of Tolquhon's case being advised, Sir David gains the interlocutor, and is freed from the contract of 10,000 merks, which was one of the sums wherewith Tolquhon sought to burden the lands, which Sir David was seeking to redeem by the compt and reckoning. See MINOR.

Fol. Dic. v. 1. p. 177. Fountainball, v. 1. p. 225. 251. 327. 353. & 507.

1766. January 17.

ALEXANDER M'ADAM against ALEXANDER EARL of GALLOWAY.

In 1678, Alexander, then Earl of Galloway, granted an obligation to Henry Dun, binding himself to denude, in his favour, of a piece of land called Belscroft, upon payment of L. 400 Scots.

In 1763, John M'Adam, the great grandson of Henry Dun, granted bond to Alexander M'Adam, his son, who led an adjudication against him, as charged to enter heir in those lands to Henry Dun; and, upon that title, pursued an action of mails and duties against the tenants.

Compearance was made for the Earl of Galloway, who produced a sasine in the lands of Belscroft, in 1684, proceeding on the precept of Henry Dun; and *contended*, That, as he and his predecessors had possessed the lands immemorially, the process was incompetent, till his titles should be reduced in a proper action.

Answered for the pursuer: The adjudication is a sufficient title against the tenants, Stair, IV. 22. 7. They are the only defenders called. The compearance of the Earl, indeed, produces a competition, but it is a rule of law, that all competitions imply mutual reductions. Nor is the pursuer under any necessity of instructing the right of the predecessor, to whom his father was charged to enter. The only title produced by the Earl, is a sasine upon the precept of that very predecessor, whose right he cannot object to, without cutting the branch upon which he himself stands.

Found incompetent, by an action of mails and duties, to set aside the right of a person in immemorial possession, and producing a sasine. Reserved to insist in a reduction of the defender's rights.

No 95. Had he produced a disposition indeed, from Henry Dun, he must have been preferred to the mails and duties ; but he produces no more than a sasine ; and a sasine, without its warrant, cannot avail in a competition of real rights ; Stair, II. 3. 19.

Replied ; Upon the footing of the infeftment 1684, the Earl has the benefit of a possessory judgment, for which purpose, the production of a sasine is sufficient ; Stair, IV. 26. 3. and 4. ; Bankton, II. 1. 33. p. 512. and IV. 24. 49. ; Erskine, IV. 1. 50. And it makes no difference that the summons was executed against the tenants only. Still the Earl was entitled to compear for his interest.

When a process of reduction is brought, it will be time to consider, whether the personal faculty of redemption granted to Henry Dun be not lost by prescription.

‘ THE LORDS sustained the defences, and assoilzied from the process of mails and duties, reserving to the pursuer to insist in a reduction of the defender’s rights, and to the defender his defences, as accords.’

Act. *M^eQueen, Crosbie.*

Alt. *Lockhart.*

G. F.

Fac. Col. No 29. p. 247.

What allegiances proponable against a process of adjudication.—*See ADJUDICATION.*

Objections competent to one party and not to another.—*See JUS TERTII.*

See APPENDIX.

COMPETITION.

SECT. I.

Arresters with Poinders.

1611. June 5. WRIGHT *against* THOMSON and ARCHIBALD.

ANE debtor being obliged to twa or more creditors, wha has decreets or re-
registrate bonds against him, gif any of them arrest his guidis in any man's
hands, and the other creditour poind the same guidis, the party in whais hands
the guidis were, will not be halden to make them forthcomand to the arrester.

Fol. Dic. v. 1. p. 178. Haddington, MS. No 2. p. 194.

No 1.
Arrestment
does not bar
other credi-
tors from
carrying off
the goods by
poinding.

1634. July 29. HUNTER *against* WILLIAM DICK.

ONE Hunter, arresting in William Dick's hands some wares pertaining to
James Spence his debtor, and pursuing to make the same furthcoming, and re-
ferring the summons to the said William Dick's oath, who granting the having
of the wares, and the being thereof in one of his cellars in Leith the time of the
arrestment, but declared that one Thomson, another creditor of the said Spence,
had poinded the same out of his cellar, by virtue of a sentence, and intromit-
ted with the same; and the pursuer *answering*, That after his arrestment, he
ought not to have suffered any other to have intromitted with the said goods
arrested, to his prejudice, but should have suspended against both parties, that
they might have disputed their rights, which of them should be preferred;—
THE LORDS found, That a prior arrestment was no impediment to any other
creditor to execute his sentence, by poinding the same goods arrested before,
and that the person in whose hands the goods were arrested, had neither reason,
nor any necessity to have stayed the poinding, nor to have suspended upon
double poinding; for no deed was done by him, to give any advantage to the
one party before the other; for if any sums of money, or other thing had been

No 2.
Found as
above.

No 2. in his hand, which he had given out of his hands without order of law, that would have been done upon his own hazard and peril ; but here, where there was no accession of any fact done by him, in whose hands the arrestment was made, to further the poinder, which pointing he could not stay ; therefore the arrestment was found could not make him liable to the arrester ; but reserved to the arrester to pursue him who had poinded, for rendering or repeating of the goods, *prout de jure*.

Act. *McGill & Sibbald.*

Alt. *Nicolson & Stuart.*

Clerk, *Scot.*

Fol. Dic. v. 1. p. 178. Durie, p. 735.

1635. *March 11.* *DICK against SPENCE and THOMSON.*

No 3.
Found in conformity with
the above.

WILLIAM DICK having certain goods belonging to Spence, a bankrupt, in his hands, which being arrested by one Hunter, creditor to the said Spence, the said William is cited upon the arrestment, to make the goods furthcoming ; and after that arrestment and citation, Thomson, another creditor of the said Spence, having, upon his bond registrate against Spence, by virtue of the Lords' letters, poinded the same goods, out of the said William Dick's cellars in Leith, where they were the time of the arrestment preceding, and also at the time of the pointing ; the said William being convened by the arrester, to make the arrested goods furthcoming, and he defending, that the same were poinded from him, as said is ; likeas the charger compeared, and in respect of his pointing claimed preference to the arrester.—And the arrester *alleging*, That he ought to be preferred to the poinder, in respect to his anteriority of diligence, in his prior arresting, and citation also of the haver before the pointing, which so affected the goods, that the haver could not have suffered any other to poind in his prejudice thereafter ; seeing if that were allowed, it should tend to make all arrestments unprofitable, and should give liberty to the haver to elide all diligence of the creditors, and to give way to the payment of any other creditors he pleased to prefer, which were against justice ; for the haver should not have suffered the poinder to enter within houses to poind, while his arrestment had been tried, whereupon he was summoned before the pointing, as said is, and the collusion of the haver with the poinder is manifest herein ; likeas he offers to prove by William Dick's oath, that by express paction betwixt him and the poinder, they convened and agreed together, that he should give way to the poinder to poind, and make open doors to him for that effect, to the effect he might be preferred, and the other creditor prejudged, which was not lawful to him to do ; and the time of the said arrestment, he took the poinder expressly bound to warrant him of the said prior arrestment, and of all danger which he might incur thereby ; and after that agreement, the said William Dick sent down his servant to make his cellars open, that the poinder might have free access thereto, and so

No 3.

point, which discovers a manifest partial proceeding of the said William Dick's, and that the pointing was done by his gratification of one creditor to the prejudice of another, which fraudulent dealing is always prohibited by law; notwithstanding of which allegiance for the arrester, (which was repelled) the LORDS preferred the posterior pointer to the prior arrester and prior citation, for the same was found no impediment to another creditor thereafter to point; and this gratification of the haver was not respected, because it was not found, as it was qualified, to be such a deed as might derogate to the arrester's lawful diligence, except that he had refused to suffer the arrester to have the like liberty, which he granted to the pointer, if the arrester had desired the same, which not being done, the haver was not found to have done any unlawful act, permitting the pointing to have its own course, which was an execution lawfully used, and done by the authority of a sentence of a Supreme Judge, which he had no necessity to have staid.

Act. Gilmour.

Alt. Stuart et Nicolson.

Clerk, Scot.

Fol. Dic. v. 1. p. 178. Durie, p. 760..

1636. February 12.

LESLEY against NUNE.

No 4.
Found as
above.

ONE GEORGE LESLEY, merchant in Edinburgh, obtaining decret against L. Ludquharn for 1350 merks, he arrests for satisfaction thereof in the hands of George Nune in the Canongate; certain coffers with clothes therein, and silver work pertaining to Ludquharn, being in the said George Nune's house, and intents action against him, to make the same furthcoming; who *alleging*, That since the arrestment, another creditor pointed the same, by virtue of letters of pointing, and letters to make open doors; and the messenger, by virtue thereof, had taken out the said chests and trunks out of the defender's house, where they were input by the Laird of Ludquharn, and so this ought to liberate this defender, who could not resist this execution, done by authority of the King's letters; —and the messenger and the pursuer *replying*, That the pointing of the said trunks by another creditor, could not excuse this defender, in whose hands he had arrested the particular goods which were within the trunks, viz. the clothes and silver work, specially libelled; and it is not sufficient to say, that the trunks and goods therein were pointed, except he condescended upon the special and particular goods which were within the said trunks, that he may know what the same were which was pointed, and the avail thereof, and how far the debt was satisfied thereby, or what superplus was thereof; —THE LORDS found the exception relevant, notwithstanding of the reply, to liberate this defender from this action, and that the defender ought not to be compelled to condescend upon the goods within the chests, which he could not do, seeing the same stood only in the defender's house, input therein by the Laird of Ludquharn, who kept.

- No 5. the keys himself, and were not in the defender's hands ; but the same trunks being taken out by the messenger, and apprised by him, the defender was altogether ignorant what the messenger found therein : And the LORDS found, that the said poinding freed the defender of the arrestment, without prejudice of the pursuer's action against the poinder thereupon *prout de jure*, which the LORDS reserved to him against the poinder, as accords.

Act. Nicolson.

Alt. Beliber.

Clerk, Gibson.

Fol. Dic. v. 1. p. 178. Durie, p. 795.

1679. December 4.

FORRESTER against The TACKSMAN of the EXCISE of EDINBURGH.

No 6.
Found as
above.

WILLIAM FORRESTER gave in a bill, representing that he had poinded the goods of John Grier brewer in Edinburgh, viz. his household plenishing and malt in his barns, and had apprised the malt by a parcel produced at the cross, and that the Tacksman of the Town's excise had procured a warrant from the Magistrates of Edinburgh, to close the doors where the said poinded goods were, whereby he was hindered in the effect of his poinding. Upon this bill the Tacksman compeared, and *alleged*, That before the poinding they had not only arrested for the King's Excise, but that the keys were taken off the rooms by the Magistrates, and that Forrester had come in but upon pretence to see the malt, and carried out a handful thereof surreptitiously, and thereby made a pretence of poinding the whole ; but as for the household stuff, they were carried to the cross, and the excise being a privileged debt, the poinding after diligence therefor could not be sustained.

THE LORDS found the arrestment did not hinder Forrester to poind thereafter, and therefore sustained the poinding of the malt, whereof a parcel at the cross was sufficient, but not of the household plenishing, seeing they were brought to the cross ; and as to the privilege of the Excise, allowed a condescendence to be made by what statute or custom it was pretended, and the parties to be heard thereupon.

Fol. Dic. v. 1. p. 178. Stair, v. 2. p. 717.

1736. February 13.

Competition, JAMES CORRIE, Provost of Dumfries, with ROBERT MUIRHEAD.

No 7.
Even an in-
choate poind-
ing, which
was stopt

JAMES MUIRHEAD, merchant in Dumfries, having failed in his circumstances, Provost Corrie, who was creditor to him, arrested in the hands of Alexander Gordon, who had the possession of some shop-goods belonging to James ; and

thereupon raised a furthooming before the Magistrates of that town. During the dependence, Robert Muirhead, who was likewise creditor to James, charged him with horning; and, when the days were expired, he sent a messenger to Gordon's house to poind the goods belonging to his debtor; but Gordon stopt him, upon this pretence, that the goods were already arrested in his hands by Provost Corrie. Whereupon a competition having ensued, it was *contended* for Robert Muirhead, That he should be preferred to the Provost in the same way as if his poinding had been completed; seeing it would be unjust, if, after he had gone on as far as he could, until he was stopt, another should be allowed to step in and complete his diligence though posterior to his own. To illustrate which, a case was referred to, where an adjudger was, by the delays and artifice of a debtor, stopt from completing his diligence until another had finished his first; notwithstanding whereof the adjudger was found not to be postponed, or the other creditor to have any preference to him; the reason of which applies directly to the point in hand, as it was by an unlawful act of Gordon's the poinding was stopped, and who, by his possession of the goods, was debtor or liable for them to the creditors, according to their diligence.

No 7.
without any
fault of the
creditor, was
found to give
a preference
in competi-
tion with an
arrestment
first complet-
ed by a de-
cree of furth-
coming.

On the other hand, it was *argued* for Provost Corrie, That he behoved to be preferred upon his arrestment; because, *imo*, No poinding could have proceeded legally upon the diligence done by his competitor; as the horning at Muirhead's instance wanted what was very material, namely, the word *apprise*, which is necessary when any thing is to be poinded; as it must first be valued, a step that is previous to and different from the poinding itself; for which reason it is constantly inserted in all hornings. Neither do the words to *poind* and *distrain* imply a power to do every thing necessary in order to the poinding; seeing very often making open doors is necessary, and it requires a particular warrant for that purpose. *2do*, The execution on the back of the horning is vitiated; and so null. It is true, a fair one has been put into the process since the competition commenced, but that cannot remove the objection; as the protest, upon which Muirhead rests his preference, especially relates to the execution on the back of the horning, after which he was not at liberty to give in a new one.

In the *next* place, Supposing these objections were removed, an offer to poind does not transfer the property; if a messenger is deforced, there lies an action against the deforcer; but, as crimes can only touch those who are guilty of them, a third party doing diligence cannot thereby be prejudged. And as to the case of the adjudger, no decision is referred to, from which the circumstances can be known; possibly it might have arisen from personal objections against the creditor's completing his diligence in collusion with the common debtor. But, whatever was in that, if an offer to poind could be considered as completed in any case, it would only hold where all is done that could be to make it effectual. Now, here the messenger omitted to provide himself with letters of open doors, whereby he might have opened the presses in which the

No 7. goods were standing ; and no hinderance or stop was put to the pointing other than this, that Gordon refused to open these presses.

Answered for Muirhead ; The objections to the formality of his diligence can have no influence ; for, *imo*, With regard to the vitiation, that is removed, by producing an original execution, wrote out fair the same day with the other, which the messenger abides by. *2do*, There is nothing in the observation, that the horning wants the word *apprise* ; as it bears to *point* and *distrain* ; nay, the word to *point*, was sufficient warrant for doing every thing that made part of the pointing ; and, where that is, the word *apprise* is superfluous ; therefore, as his diligence is unexceptionable, his attempt to point must be held as completed. Nor is it of any importance, that an endeavour to point does not transmit the property ; as that is suppliable by a decree of the Court, giving a preference in respect of the diligence inchoate and unlawfully interrupted. Neither had the messenger any occasion for letters of open doors, as he got voluntarily within the house, nay, within the very room where the goods were lodged ; and, although the law knows what letters of open doors are, yet letters to open chests and presses is a novelty. Besides, he is not bound to tell whether he had such letters or not ; as the messenger was stopt, not for want of them, but on account of Provost Corrie's prior arrestment.

THE LORDS preferred Robert Muirhead.

Fol. Dic. v. 1. p. 178. C. Home, No 14. p. 35.

1767. July 27. HELEN STEVENSON *against* COLQUHOUN GRANT.

No 8.

An arrester having obtained from a Judge a warrant to sell ; found the goods could not, in that state, be pointed, being held to be *in manibus curiæ*.

IN a furthcoming upon an arrestment, the arrestee having deponed upon certain goods in his hands belonging to the common debtor, the Lord Ordinary granted warrant to the inferior judge to sell the goods for behoof of the arrester ; but, before the order was put in execution, the goods were pointed and carried off by another creditor. This fact produced an action for the value of the goods, at the instance of the arrester against the pointer. The Lord Ordinary having sustained the defence of lawfully pointing, the interlocutor was altered by the Court, who sustained the action, and repelled the defence, upon the following ground ;—supposing goods to be *in manibus curiæ*, the Court cannot be deprived of its possession at short hand by a pointing. The goods were here under the power and direction of the Court, without which the Court could not issue a warrant for sale.

This argument appears to me inconclusive. In the *first* place, I see not clearly why even a proper sequestration in the hands of the Court of Session should exclude a pointing which proceeds upon the King's authority. *Secondly*, If a warrant to sell in a process of furthcoming be equivalent to a sequestration, so must a warrant for arrestment ; for both warrants proceed equally upon the supposition that the goods are under the power and direction of the Court.

And yet it was never thought that an arrestment could obstruct a poiding. The judgment, however, is right upon a principle of equity, that undoubtedly moved the Judges, though it was not brought into the reasoning, namely, That an inchoated attachment by one creditor ought to bar all others; which is laid down and enforced in the principles of equity.

Fol. Dic. v. 3. p. 151. Sel. Dec. No 257. p. 329.

S E C T. II.

Arresters with Appriseres and Adjudgers.

1623. February 14. L. SALTCOATS *against* BROWN.

THE L. Saltcoats having arrested the mails and duties of a tenement of land pertaining to his debtor, and pursuing to make the same furthcoming, compeared one Brown, and *alleged* that he ought to have the said mails and duties, because he had comprised that tenement long before the arrestment, whereby he became in the heritable right in the land, and consequently ought to be preferred to be answered of the duties thereof.—THE LORDS prefer the arrester, by virtue of the sentence, notwithstanding that the comprising was also a sentence, and that it preceded the arrestment; because there intervened a great space betwixt the comprising, and before the arrestment, during the which whole space neither had the comprisinger obtained sasine, nor yet since was he seased; neither had he done diligence to recover sasine, nor used any other diligence all that intervening time, upon the comprising, without the which he could not be found to have a real right; and so repelled his allegiance founded upon his comprising.

Clerk, *Hay*.

Fol. Dir. v. 1. p. 179. Durie, p. 46.

1627. December 13. TENANTS of DRYUP *against* SHERIFF of FOREST.

IN a double poiding, at the instance of the tenants, possessors of the lands of Dryup, who were distressed for the duties of the said lands by the Sheriff of Forest on the one part, who had comprised the said lands, for a just debt, from Scot of Dryup, and, conform to the comprising, was heritably infest in the same lands divers years before the crop 1626, which was now drawn in question; and

No 9.

An arrester of bygone annualrents was preferred to a prior appriser of an infestment of annualrent, the appriser having been *in mora*.

No 10.

An appriser infest, preferred to a subsequent arrester, although the appriser had suffered

No 10.
the debtor to
retain posses-
sion for many
years.

which duties of the crop now controverted he had arrested, and so craved to be answered of the samen; and, on the other part, they were craved by another creditor to the said Scot of Dryup, who, upon a registrate bond, had charged and denounced the debtor, and had arrested the saids duties libelled, long before the Sheriff's arrestment. — THE LORDS pteferred the compriser, who was infest, as said is, to the creditor arrester, albeit the creditor, who had arrested, claimed preference, as doing more timely and lawful diligence than the compriser, seeing, divers years being past after his comprising and infestment, he had suffered his debtor to retain the possession of the lands comprised, and had done no diligence upon his rights to recover possession, as he might have done, which is a great presumption of simulation, and could not therefore give any preference to him against this arrester, who had done all which was necessary of law to recover his payment; notwithstanding whereof the compriser being infest, as said is, was preferred, and the retention of possession by the debtor was found no impediment to this preference.

Act. Scot.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. 1. p. 179. Durie, p. 320.

1628. December 2.

CUMING against CUMING.

No 11.

FOUND, that an arrestment of farms cannot be of force, being made before the term of Martinmas, if *medio tempore* the lands be comprised, and the compriser infest before the term.

Fol. Dic. v. 1. p. 179. Kerse, MS. fol. 235.

1628. December 13.

HUNTLY against HUME.

No 12.
Found in con-
formity with
the above.

In a triple poinding, Huntly against Hume and L. of Renton, the lands of the common debtor being comprised by a creditor, viz. Renton, and he being infest thereupon before the term of Whitsunday, and before the comprising, another creditor having arrested upon his sentence, that term's duty, owing by the tenant, possessor of the land, to the master, who was the common debtor, the arrestment being execute before that term of Whitsunday came, whereat the debtor was obliged to pay; and, while the term was running, the arrestment was laid on, and, after the term came, he obtained sentence, decerning that term's duty to be made furthcoming, whereon the question being drawn in by the tenant, if he should be subject to pay to the arrester or to the compriser; — THE LORDS found, That the compriser being seased before that term, ought to have that term's duty subsequent after the sasine, and not the arrester, albeit the arrestment was execute before the comprising, whereupon the sasine pro-

ceeded, seeing the heritor, who was debtor, being denuded lawfully of his right to the land before the term, by the said comprising and sasine, he had thereby right to the duties of the terms subsequent after his sasine, after the said term was come; and, as the debtor from whom he comprised could not seek that term's duty, no more could the arrester, who could not seek the same, but as the farm or duty owing to his debtor, who ceased to be heritor, he being denuded of his right by comprising before the term at which he might have craved the duty: For albeit the creditor might lawfully arrest before the term of payment came; yet the arrestment affected not the same to the arrester, so that he might seek the same when the term came, except at that term, the right thereof then subsisted with him, for whose debt it was arrested; as if the term's duty of lands, liferented by any, were arrested for the liferenter's debt, and that the liferenter should die before the term of payment of the arrested duty came, *quo casu* the arrester would get nothing, because the debtor's right became extinct; even so in this case, albeit there be great difference in these cases, yet so it was found, and for the same reason, another creditor claiming the same duty, by virtue of an assignation made to him by the debtor, divers years before the term controverted, and before all the other parties rights, in and to the duty of these lands, of certain years preceding that term, and divers years to run after that term, which assignation was intimate long before their rights; and also the assignee divers years in possession thereof before the term controverted, and done for satisfying his just debt; yet the compriser was preferred, for the assignation was not found a valid right against a singular successor: And it was found, that an assignation to the duty of a tack, set by the heritor, made to his creditor, would not work against a singular successor, in and to the setter's heritable right; but that either the compriser, or other acquirer thereof, or buyer, would have right to the tack duty, notwithstanding of the preceding assignation, clad with possession.

Act. Craig.

Alt. Lawrie.

Clerk, Hay.

Fol. Dic. v. 1. p. 179. Durie, p. 408.

1667: July 2. WILLIAM LITSTER *against* AITOUN and SLEICH.

WILLIAM LITSTER having arrested his debtor's rent on the 5th of April 1665, he thereupon obtained decret for making furthcoming in July 1666; which being suspended, compearance is made for Sleich, who had right to several apprisings of the lands, which were deduced before the terms of payment of the rent; and craved preference to the arrester, because his arrestment was before the term, and the time of the arrestment there was nothing due; and also before the term the debtor was denuded by an apprising, whereupon infestment followed in December thereafter, and must be drawn back, *ad suam causam*, to

No 13.

Arrestment laid on *currente termino*, affects the next ensuing terms rent. Such was preferred to an apprising deduced also before the term, though after

No 13.
arrestment,
whereupon
infestment
followed after
the term.

the apprising. The arrester *answered*, That his arrestment was valid, being laid on *currente termino* for the next ensuing term, at least as hath been oft-times decided by the LORDS, and is now their constant practice: And as for the apprising before infestment, albeit it will carry the mails and duties, yet it is an incomplete right, and hath only the effect of a judicial assignation or disposition; so that the competition being betwixt an assignee, viz. an appriser and the arrester, the arrestment being prior, is preferable to any assignation. Neither can the infestment on the apprising, after the term, give any right to the rent prior to the infestment, but the right thereto is by the apprising, which is but a naked assignation.

THE LORDS preferred the arrester.

Fol. Dic. v. 1. p. 179. Stair, v. 1. p. 467.

1671. February 23. LORD JUSTICE CLERK *against* Mr JOHN FAIRHOLM.

No 14.
A decree of
apprising is a
complete dili-
gence, as to
mails and du-
ties, being a
legal assigna-
tion, and
needing no
intimation;
so that there
can be no mo-
ra. On this
principle, in
opposition to
No 9. p.
2763. an ap-
priser of an
infestment of
annualrent
was preferred
to a posterior
arrester, tho'
the competi-
tion was nine
years after the
decree, and
the appriser
had done no
diligence.

THE Earl of Leven being debtor to Lamberton in 40,000 merks, and having infest him in an annualrent out of his lands in security thereof, Mr John Fairholm did; upon a debt due by Lamberton, apprise the foresaid heritable bond and annualrent, which was holden of the Earl of Leven himself, who was charged upon the apprising, but unwarrantably, to infest Fairholm in the lands, whereas the annualrent only was appraised, and the charge should have been to infest Fairholm in the annualrent; thereafter Fairholm did arrest the bygone annualrents in the Earl of Leven's hands, and after all did, upon a decret against Lamberton, arrest the bygone rents in Leven's hands; and Lamberton's liferent of the annualrent having fallen, by his being year and day at the horn, the Justice Clerk, as donatar to the liferent, and as arrester competing with Fairholm, did allege that Fairholm's apprising being an incomplete diligence, and no infestment nor valid charge thereon, and having lain over so many years, the arrester must be preferred; for which he adduced a practise observed by Durie, 14th February 1623, Saltcoats *contra* Brown, No 9. p. 2763. where it was so found; and albeit Fairholm be the prior arrester, yet he hath done no diligence upon his arrestment, whereas the Justice Clerk hath obtained decret; and, as donatar to the liferent escheat, he is preferable for years after the rebellion; because the liferent escheat falling before any infestment, or charge on the apprising, which was not used within year and day, the liferent excludes the appriser.

THE LORDS found the apprising preferable to the posterior arrestment, though no legal diligence was done thereon for the space of nine years thereafter, in respect the apprising, being a judicial assignation, required no intimation, and being prior, it is preferable; and they did not respect that single practise, the constant custom being contrary; but found the liferent escheat preferable to

the anterior apprising, being without infeftment or charge as to the years after the rebellion, and preferred the appriser as to years preceding.

No 14.

Fol. Dic. v. 1. p. 179. Stair, v. 1. p. 727.

1705. June 26. STEWART of Pardovan *against* STEWART of Torrence.

IN the competition of the creditors of George Dundas, Pardovan produces an adjudication of a bond granted by Bonhard to George Dundas, his heirs and executors, containing a precept of sasine, and craves to be preferred to Torrence, who produced an arrestment in Bonhard's hands, and a decret of furthcoming, upon this ground, because his citation in the adjudication was before the arrestment, and his decret before the furthcoming.

It was *alleged* for Torrence ; That the sum was moveable, and an adjudication was no competent nor habile diligence, because no infeftment had followed upon the bond, neither was the first term's payment of annualrent, nor the term of payment of the principal sum past, when Pardovan raised and executed his adjudication ; and sums heritable by destination were always reckoned moveable till the first term's payment of the annualrent.

It was *answered* ; 1mo, The question is not here betwixt an heir and an executor, but betwixt competing creditors. 2do, This bond, containing a precept of sasine, and bearing annualrent from a term preceding the citation, was heritable from the beginning ; and the 32d act, Parliament 1661, declares such bonds to be heritable.

It was *replied* ; The case is to be considered in the same way as if the question were betwixt the heir and the executor. Sums moveable fall to the executor, and cannot be adjudged, because they are moveable. 2do, As to the act of Parliament 1661, it does declare such bonds to be heritable ; but that is only to distinguish them from bonds bearing annualrent, which by that act are declared moveable, even after the term of payment, which antiently were heritable, yet were esteemed moveable before the term of payment : as to which, there is nothing enacted by that law, and therefore it has been frequently decided, that bonds heritable after the term of payment, are moveable before ; as *penult.* of June 1624, Smith *contra* Anderson's relict, *voce* HERITABLE and MOVEABLE.

It was *duplied* ; Decisions in this case favour Pardovan, as well as the positive statute, as Bairs of Colonel Henderson against Murray, *voce* HERITABLE and MOVEABLE ; where the Colonel having taken a bond bearing annualrent from Whitsunday, payable at Martinmas, and he dying in August, the bond was found heritable ; the like the last of July 1666, Gray *contra* Gordon, *IBIDEM*, *et voce* ESCHEAT, where a bond bearing the term of payment to be diverse years after granting the same, and annualrent to be paid yearly and termly in the interim, was found to be heritable, though the creditor deceased before the term of payment ; Anderson *contra* Anderson, *voce* HERITABLE and MOVEABLE. And

No 15.

In a competition betwixt an adjudger and arrester, the subject being an heritable bond, the citation on the adjudication being prior to the arrestment, and the decree of adjudication also prior to that of the furthcoming, the adjudger was preferred.

No 15.

as to the practise cited by Torrence, the case differs from the other practiques in matter of fact, which is the foundation of the difference of the decision; for there the bond bore only annualrent from the term of payment, and so, at the creditor's death, which was before the term, it bore no annualrent; whereas in this case, and the other practiques cited, though the defunct died before the term, yet the annualrent was current from the date of the bonds, which, by the conception thereof, and the design of the creditor, were heritable.

‘THE LORDS found the sum heritable and adjudgeable.’

It was further *alleged* for Torrence; He was still preferable, because such bonds, though heritable, are also arrestable by the 51st act, Parl. 1661; and his arrestment being before Pardovan's adjudication, he was preferable.

It was *answered*; That the citation in Pardovan's adjudication is prior to the arrestment, and his adjudication before the furthcoming; so that his diligence did first commence, and was first complete.

It was *replied*; A citation in an adjudication is a good prohibitory diligence to disable the debtor from voluntary deeds, but does no ways affect the subject; whereas an arrestment is *nexus realis*, which really affects the subject arrested, and transfers the property. Though a furthcoming be necessary to compleat the right, yet the summons of furthcoming libels the arrestment to affect the subject, and transmit the right, and therefore concludes that the same should be made furthcoming. It is true the right acquired by the diligence of arrestment is easily lost, if the same diligence be not duly prosecute, so as other creditors intervene; but here there is no negligence; for albeit the competing adjudication be prior, that is because adjudications abide not the course of the roll, not require probation; but otherwise all possible diligence was adhibit in obtaining this furthcoming.

It was *duplied*; That the property is not conveyed by an arrestment without a furthcoming; neither will an arrestment hinder pouding; and in this case Pardovan having used a habile diligence, and cited before the arrestment, and also obtained the first decreet, he is undoubtedly preferable.

‘THE LORDS preferred the adjudger.’

It was further *alleged* for Torrence; Still he is preferable, because, for his further security, he also obtained the first adjudication; and that though Pardovan adjudged within year and day, because the subject adjudged was a liquid sum of money, which is naturally divisible, and can be proportioned to the debt adjudged for; and the act 1661 bringing in adjudications *pari passu*, doth only concern apprisings or adjudications of real rights whereupon infestment followed, as appears by the act itself bearing, That all adjudications within year and day of the first effectual comprising are *pari passu*; and for explaining what is meant by an effectual comprising, it is declared, That such comprising as are preferable to all others, in respect of the first real right and infestment thereon, or the first exact diligence for obtaining the same, are and shall be holden the first effectual comprising. And seeing in this case there neither

was nor could be any infestment for denuding the creditor, who stood not infest, the act takes no place, but the adjudications are preferable according to their dates.

No 15.

It was *answered* ; The reason expressed in the act is general, relating to all creditors doing diligence, and considers the prejudice of creditors who are at a great distance, whereby the debtor's estate is comprised, which word *estate* comprehends all comprisable subjects ; and then considers the prejudice of creditors, who have nothing but legal reversion ; and for remeid thereof, statutes that all comprisings within year and day of the first effectual comprising shall come in *pari passu* ; and what follows for clearing an effectual comprising, is indeed to be understood only of comprising of lands or real rights, because in that case an apprising, without an infestment or charge, is but personal, and a posterior apprising with an infestment is preferable ; but an apprising of a personal right is complete and effectual from the date.

* THE LORDS found that the adjudgers ought to come in *pari passu*.' See No 14. p. 140., and No 41. p. 703.

Fol. Dic. v. 1. p. 179. Dalrymple, No 63. p. 79.

1724. January 8.

SYME against DALZELL.

IN a competition betwixt two creditors of a defunct, about the rents of the estate falling due after the debtor's death ; both having obtained decrees of constitution against the apparent heir ; the one upon an arrestment laid on in the tenant's hands as debtors to the apparent heir, obtained furthcoming ; the other upon a charge to enter heir, obtained adjudication some months thereafter. THE LORDS preferred the arrester, though it was urged, that an apparent heir has no proper title to the rents, and that they cannot be made furthcoming for his debt. See APPARENT HEIR.

No 16.

Fol. Dic. v. 1. p. 179.

1758. July 18.

GILBERT JACKSON, and Others against JAMES HALIDAY, and Others.

ON the 5th November 1750, William Ferguson disposed his lands of Cairoch to Duke and Brown ; and they became bound to redeem these lands from Mr Heron, to whom they had been disposed under reversion, and to grant back-bond to Ferguson, declaring the lands redeemable between and Martinmas 1751, upon payment of debts due to them, and of the redemption-money they were to pay to Heron ; under condition, ' That if Ferguson should not redeem at Martinmas 1751, they should be at liberty to sell the lands by public roup, and

No 17.

A creditor held lands, with a power to sell (if not redeemed within a limited time), and to account for the price ; ano-

No 17.
 ther creditor
 adjudged the
 reversion,
 and a third
 arrested in
 the hands of
 the first who
 had sold the
 lands.—The
 adjudger pre-
 ferred.

take the security of the price payable to themselves, and to be only liable to Ferguson for any balance, after payment of their debts and expenses.'

On the 24th July 1752, Grierson, a creditor of Cairoch's, obtained an adjudication against him of all right of reversion competent to him.

Haliday and others executed summonses, and obtained decreets of adjudication within year and day of Grierson's; but between the execution of their summons, and the obtaining their decret, Duke and Brown, on the 17th of May 1753, sold the lands by roup to Agnew; who granted bond to Duke and Brown.

Jackson and others used arrestment in the hands of Duke and Brown, after Martinmas 1751, but before the sale to Agnew; and after the sale, they arrested also in the hands of Agnew.

Certain other creditors arrested in the hands of Duke and Brown after the sale.

Objected by the arresters against Grierson's adjudication, That as the term limited for redemption was elapsed before his adjudication was obtained, Ferguson's right, being then only a personal claim for the balance of the value, could not be carried by adjudication.

Answered, The sale to Duke and Brown was *pactum legis commissoriae*; and therefore Ferguson had a right of redemption after Martinmas 1751, till the lands were sold, which was properly carried by Grierson's adjudication; and by the nature of the transaction, Duke and Brown did not become proprietors after Martinmas 1751, though at that term their right to sell the lands commenced.

Objected to the adjudications led by Haliday and others, That after the sale to Agnew, Ferguson had no right to redeem the lands. His claim was only for a balance of the price; a moveable subject, not attachable by adjudication.

Answered, These adjudgers had executed their summonses before the sale to Agnew, after which no voluntary deed could have the effect to disappoint them, though, no doubt, the sale was notwithstanding competent in consequence of the prior powers. *2dly*, As their decreets were within year and day of Grierson's, the validity of this adjudication must support them; agreeable to a decision in the ranking of Netherwood, 29th January 1748, Irving *contra* Sir William Maxwell of Springkell, *voce* HEIR APPARENT; where one creditor adjudged before a judicial sale by an apparent heir, and another after the sale, but within year and day of the first, and both adjudications were ranked equally. The decision in the ranking of Bonjedward was also referred to, No 56. p. 724.; and the common practice of leading adjudications against an estate after a judicial sale, in order to convey them to the purchaser.

Objected to the arrestments in the hands of Duke and Brown before the sale, That Ferguson's right was at that time not a moveable claim, but a right of reversion not arrestable.

Answered, From the elapse of the term for redemption, Ferguson's claim was only for the balance of the value.

No 17.

No objection was made to the arrestments in the hands of Duke and Brown after the sale, but against the arrestments in the hands of Agnew.

Objected, That Agnew was not debtor to Ferguson, but to Duke and Brown; and though Ferguson might have been entitled to insist in a declarator against Agnew, that the surplus price belonged to him in preference to his trustees; yet this was not so direct a claim, as to found an arrestment; nor could arrestment be competent in the hands of distinct persons to attach the same subject.

Answered, That by the accustomed style of arrestments, all moveable subjects are attached, not only due directly to the principal debtor, but 'to any other person or persons for his use and behoof, by bond, bill, &c.' And there can be no dispute, that Agnew owed the surplus price in this case to Duke and Brown, for the use and behoof of Ferguson.

'THE LORDS found, That the adjudications were the only proper diligence to carry Cairoch's interest in the lands, and the price thereof; reserving the consideration of the competency of the arrestment in the hands of Nathaniel Duke and Patrick Brown, and those in the hands of David Agnew the purchaser.'

For the Arresters, *Montgomery*.Alt. *Lockhart*.Clerk, *Kirkpatrick*.

W. 7.

Fol. Dic. v. 3. p. 152. Fac. Col. No 125. p. 229.

S E C T. III.

Arresters with Assignees.

1618. June 16.

A. against B.

FOUND that an arrestment upon an action depending, with sentence following, should be preferred to an assignation, which was not intimate before the arrestment, albeit intimate an half year before sentence.

No 18.

Fol. Dic. v. 1. p. 178. Kerse, MS. fol. 234.

1623. February 21. CRAW against IRVINE, and Others.

ONE CRAW arrests in the hands of certain persons some sums and corns addebted by them to one Mr James Irvine, who was addebted to CRAW in some money; for satisfaction whereof they being pursued to make the same furthcom-

No 19.
A prior assignee found obliged to

No 19.
show onerosi-
ty, in compe-
tition with an
arrester who
had charged,
but not de-
nounced.

ing, compeared a person who was made assignee to the particulars arrested by the said Irvine, and *alleged*, That the goods should be decerned to pertain to him, in respect of the assignation made to him before the arrestment, and that the same was also intimate before the arrestment; in fortification whereof the said assignee condescended on the onerous cause, for making of the said assignation, and offered him to prove, that Irvine his cedent being debtor to sundry persons his creditors, in certain sums of money, this assignee at his desire promised to the saids creditors payment of their debts: Likeas, he had truly made payment to them, for satisfaction whereof, and relief of the said payment, the said assignee got the said assignation, and so depending upon that onerous cause, he ought to be preferred to the arrester; and the foresaid cause he offered to prove it by the oaths of the saids Irvine's creditors, to whom he had made payment. It was *answered* for the arrester, That that assignation ought not to be respected in prejudice of him who was a lawful creditor, and who had a registrate obligation, which was a sentence against the common debtor, long before the said assignation; before the which assignation he had also charged his debtor, and who becoming bankrupt and fugitive out of the country since, could not make an assignation to another of his creditors in prejudice of his debt and sentence, and charge preceding, thereby to prefer one creditor at his pleasure to another doing more timely diligence; and so *alleged* that that assignation came under the statute of dyvours, specially seeing there was no writ extant to prove the preceding debt, for which the alleged assignation was made. It was *answered* for the assignee, That there was no necessity for him to shew any preceding debt in writ; for, what was betwixt Irvine and his creditor, it was neither pertinent nor possible for him to know, but it was certain, that he, at Irvine's desire, having promised to pay them, and having according thereto made payment, and receiving this assignation for his relief or warrant, he therefore hath a just cause of his debt, whereupon he offered to give his own oath of verity, which is the manner of probation prescribed by the act; and so he ought not to be urged to any further probation, and yet he also offered to prove the whole cause of the assignation by the oaths and depositions of the saids persons creditors of the said Mr James Irvine, who were persons *omni exceptione majores*, viz. the one being the bishop of Dunkell, and the other the minister at . THE LORDS astricted the assignee to prove by writ, that Irvine was debtor to these two persons paid by the assignee, and would not sustain the same to be proven by the parties' oaths, neither would sustain the said allegiance of the cause of the assignation to be proven by the assignee's own oath, notwithstanding of the statute; but that part anent the debt owing by Irvine to the creditors, being proven by writ, they found the rest of the allegiance, anent the promise and payment made by the assignee, might be proven by the saids two creditors their declarations, otherwise the LORDS would prefer the arrester, whose diligence they found sufficient, consisting of the foresaid

obligation registrate, and preceding charge of horning, albeit the denunciation was not execute, nor followed thereupon.

No 19.

Act. Nicolson, jun. et sen.

Alt. Hope et Person.

Clerk, Gibson.

Durie, p. 48.

1629. January 30. DAVIDSON against BALCANQUAL.

A debtor having made his creditor assignee to a debt, owing to him, the term of payment of the which debt owing by the common debtor to the assignee his creditor; was not come by the space of three or four months after the date of the assignation; and this assignation being intimate that same day after the date thereof, that same very day another creditor arrests the same, whose term of payment was past the time of the arrestment; and summons to make the same furthcoming, being pursued by them both, the difference of days of compareance, and citations, was in four or five days, whereof the arrester had the advantage of priority; likeas his arrestment bore the hour of his execution; as also the intimation bore the hour of the making of the same for the assignee, which hour in the arrestment proported a time, which conferred with the hour of the intimation, preceded the same by the space of two hours. THE LORDS preferred the arrester; the reason specially was, because of the priority of the hour, which the LORDS found in this case to be material; for after that moment of arrestment; neither could the common debtor do any thing in prejudice thereof, neither could the intimation, made any space thereafter, affect the debt to the assignee, it being affected of before to the arrester; and the intimation and arrestment bearing these hours, it was found, there needed no other probation to prove the priority.

Act. Stuart.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. I. p. 178. Durie, p. 426.

1630. January 28. INGLIS against EDWARD.

MR CORNELIUS INGLIS and Nicol Edward, two creditors to John Mackuby, the former having arrested a sum owing to the common debtor by Mr. Thomas Ramsay, 13th November, and the other having intimate an assignation made to him by the debtor upon the same day, and they striving for preference; THE LORDS, in respect of both their diligence concurring, would not prefer the one to the other, but divided the sum betwixt them.

Fol. Dic. v. I. p. 178. Spottiswood, (CREDITORS.) p. 76.

No 20.

Is a competition betwixt an assignee and an arrester, the Lords preferred the arrester, whose execution bore to be two hours before what the intimation bore.

No 21.

An arrestment and the intimation of an assignation being made in one day, the Lords brought them in *pari passu*, and divided the sum betwixt them.

1638. December 6.

DOUGLAS against MITCHELL.

No 22.

An assignation, though intimated after an arrestment, was preferred, the arrestment being upon a dependence, and no decret yet recovered against the common debtor.

MR HUGH DOUGLAS, cautioner for Mr Andrew Lermouth, minister at Libberton, being decerned to pay the debt; the said Mr Hugh receives for his relief from Mr Andrew an assignation to certain bolls of victual, to be paid by certain tenants, off the lands of , for his stipend of the crop 1638, which was not sown on the ground the time of the assignation; and after the said assignation, The said Mr Hugh arrests the said victual in the tenant's hands, and thereupon intents action against them, to make arrested corns furthcoming: In the which action William Macchell, another creditor of the said Mr Andrew, compares, who had arrested the same corns, and claimed to be preferred to Douglas, in respect of his anterior arrestment before the arrestment executed by Douglas; and albeit the assignation to Douglas be prior, yet the same ought not to be respected, except it had been also intimate before his, which was not done, and the arrestment made by Douglas is after his arrestment. Attour, it cannot be respected as an intimation of the assignation, but in effect is a passing from the assignation, seeing he hath arrested the corns as the cedent's corns, and not as pertaining to him as assignee, and no ways making mention of the assignation; so that it cannot be respected as an intimation of the assignation, but rather that it is a confession that the corns still pertained to the cedent; and further, the assignation can give him no right, being of corns which were not then extant, neither being sown nor growing, and of the law *non entis nulla est obligatio*. The Lords repelled the allegiance, and sustained the arrestment as sufficient intimation of the assignation, albeit of corns not then growing, but being for a stipend of a year ensuing, seeing the minister lived while it became due to be paid to him; especially the arrestment was sustained as a sufficient intimation against this other defender, who had not obtained as yet sentence against Mr Andrew Lermouth, constituting him his debtor, and so who could not be a just party, to claim arrested goods to be made furthcoming, before he had obtained sentence for his debt.

Act. Hope.

Adv. Elliot.

Clerk, Gibbon.

Fol. Dic. v. 1. p. 178. Durie, p. 864.

1642. June 22.

NISBET against WILLIAMSON, FOULIS, and NISBET.

No 23.

An assignation intimated before arrestment is preferable.

In a triple poinding, Foulis being debtor to Nisbet in a sum, for which the said Foulis being charged by another Foulis, assignee to the said Nisbet; and Nisbet comparing as another of his creditors, who had arrested the sum in Foulis's hands, for satisfying of the debt owing to them by their common debtor; and Williamson comparing as another of the said common debtor's creditors; the assignee claiming preference to the arrester's creditors of the common

debtors, in this sum controverted, because he was made assignee before these other parties arrestments, and had done diligence before them, the common debtor being his lawful debtor, as is confest by him in his assignation; and the arresters *answering*, That they should be preferred to the assignee, seeing the assignation was made by a bankrupt *in meditatione fugæ*, there being no debt which the assignee can instruct was owing to him; likeas, he was then the cedent's servant, and so presumed a confident person; and the assignee opposing his assignation thereto; the LORDS preferred the assignee to the arresters, the assignee giving his oath that the cedent was his true debtor the time of the assignation, in as great sums as that money assigned; and he giving so his oath, the LORDS found no necessity, that the assignee should be holden to qualify by any other writ, that the cedent was his debtor, in respect of the act of Parliament, which admits that probation by the parties oath; for, as when any party buys lands, or goods, from any person who becomes bankrupt, the alienation cannot fall, albeit the buyer cannot instruct, by a preceding writ, that the seller was his debtor in any sums of money, the alienation being done *bona fide*; even so in this case.

Clerk, *Hey.*

Fol. Dic. v. 1. p. 178. Durie, p. 895.

1687. July.

ADIE against SCRIMZEOR.

No 24.

THE Earl of Seaforth being debtor to James Clerk of Wright's Houses, in a certain sum by bond, which was assigned to Mr David Scrimzeor; and, at the same day that the assignation was intimate, Bailie Adie, another creditor of James Clerk's, arrested the sum in the Earl of Seaforth's hands. And it being *alleged* for the assignee, That he ought to be preferred, because the intimation did condescend upon a particular hour and day upon which it was intimate; whereas the arrestment is only general, that it was laid on that day, but did not condescend upon the hour. *Answered*, That the arrestment being general, it might have been as well before as after the intimation; and he produces a declaration by the Earl of Seaforth, the common debtor, that the arrestment was two hours before the intimation of the assignation, and therefore he ought to be preferred.—THE LORDS ordained the arrester and assignee to come in *pari passu*.

An arrestment and the intimation of an assignation being on the same day, only the intimation mentioning the hour; and the common debtor having declared, under his hand, that the arrestment was two hours prior to it, the Lords ordained them to come in *pari passu*.

Fol. Dic. v. 1. p. 178. Sir P. Home, v. 2. No 949.

1724. July 8.

Dame EMILIA GRAHAM, Relict of Sir NEIL CAMPBELL of Allangreig, *against*
JOHN CAMPBELL, Taylor in Edinburgh.

No 25.

A posterior
arrestment
preferred to
an assignation
not intimated.

SIR NEIL CAMPBELL being debtor to the defender, assigned him to certain arrears of pay, under back-bond that he should account for the same. The pursuer, as executrix to her husband, pursued Mr Campbell for delivery of a debenture note, which he had got for these arrears.

The defender claimed retention of L. 568 Scots due by Sir Neil to Sir David Forbes, and by him conveyed to Campbell of Rachean, for which debt there had arrestment been used in the hands of the Commissioners of Equivalent, as debtors to Sir Neil in these arrears, against whom Rachean had obtained a decret of furthcoming; and the defender, as creditor to Rachean, had arrested in the hands of the Commissioners what was due to him in virtue of his decret of furthcoming.

It was *answered*, That the arrestment was prescribed, being in October 1718, and no decret of furthcoming ever obtained thereon. *2do*, That Sir Neil had granted to Rachean a corroborative security for this debt, which was assigned to Messrs Boyle and Smollet, who had passed from their cedent's arrestment.

Replied to the 1st, That, by an act, *quinto Georgii*, intituled, 'An Act for settling certain yearly Funds, payable out of the Revenue of Scotland, to satisfy public Debts in Scotland, and other Uses, as mentioned in the Treaty of Union, and to discharge the Equivalents,' &c. the Commission of Equivalent was finally voided and determined, and the Barons of Exchequer were empowered to clear the Commissioner's accounts and discharge them; and, therefore, after that it was not practicable to pursue any decret of furthcoming against the Commissioners, but the defender, in supplement thereof, before his arrestment could prescribe, raised a declarator before the Court of Session, to have it found, that these sums stood affected with his arrestment.

To the 2d it was *replied*, That the assignation to Boyle and Smollet was never duly intimate.

It was *duplicated*, That the Commissioners might have been convened upon the arrestment used in their hands, notwithstanding that their commission was revoked, as appeared from the 6th act of Queen Anne, intituled, 'An Act for the further directing the Payment of the Equivalent money.'

THE LORDS found, That the arrestment was not prescribed, and preferred the arrester to the assignee, in respect the assignation was not intimate.

Reporter, Lord Pencaitland.

Act. Pat. Campbell.
Clerk, Gibson.

Alt. Arch. Hamilton, sen.

Edgar, p. 74.

1748. November 10. DAVID GIBSON *against* RICHARD MURRAY.

DOUGAL MURRAY, merchant in Inverary, had furnished goods to Colin Campbell of Kilberry, on account carried down to the year 1737; and having cleared with Captain Angus Campbell, Kilberry's curator and factor, adjected to the foot of the account a draught, 11th November 1739, for the balance, 'value due by Kilberry, as per above,' which Captain Campbell accepted; and Dougal Murray assigned it, 17th November 1745, to Sir Richard Murray, merchant in Edinburgh.

David Gibson, taylor in Inverary, creditor to Dougal Murray, had arrested the debt in Kilberry's hands, 1st June 1743; and a competition arising, the LORD ORDINARY, 19th February 1747, 'in respect the arrestments were laid on, not in Captain Campbell's hands, but in Campbell of Kilberry's, found these arrestments did not interpel the Captain from making payment of the sums due upon his bill.' And, 8th December, 'found the arrestments in Kilberry's hands could not compete with Sir Richard's assignation.'

Pleaded in a reclaiming bill, The debt was originally Kilberry's, and he continued debtor, notwithstanding the draught, which being subjoined to his account, bore to be for it, and was accepted by the Captain only as his factor and curator, who thereby did not bind himself, since a person contracting *factorio nomine* binds only his constituent; 17th February 1738, Ranken *contra* Molli-son, *voce* FACTOR; but supposing him bound, Kilberry was likewise; so they were *correi debendi*; and arrestment in the hand of either must affect the debt.

Answered, The Captain was properly debtor; the title of the account was, 'Account Colin Campbell of Kilberry, by desire of Captain Angus Campbell;' so that his faith was followed, and he gave a security for his own debt. If Kilberry originally was liable, the taking the bill operated a discharge of the account; for which he could not afterwards be pursued. And it is evident the arrestment, when used, could not operate as in the hand of a *correus debendi*, from this, that, at granting the bill, the account was near prescribed; was never interrupted against Kilberry, and was actually prescribed *quoad* him when the arrestment was used.

THE LORDS preferred the arrester.

For the Arrester, Jo. Campbell, sen.

Alt. Maitland.

Clerk, Gibson.

Fol. Dic. v. 3. p. 151. D. Falconer, v. 2. No 7. p. 8.

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No 26.

A curator accepted a bill for an account furnished to his minor, bearing for that value. The creditor assigned it. Prior to the assignation, an arrestment had been laid in the hands of the minor himself. The arrester was preferred.

1755. *January 31.*

Competition, betwixt ADAM FAIRHOLM, &c. and ALEXANDER HAMILTON,
Solicitor at London.

No 27.

In a competition between an arrestment and a prior assignment granted in England, which, according to the form of that country, is not intimated, the arrestment was preferred.

ADAM FAIRHOLM, creditor to Captain Alexander Wilson of London, took a decret of registration before the Court of Session, February 1751, upon his grounds of debt, and laid an arrestment in the hands of the Earl of Rothes, debtor to Wilson in a considerable sum. In the process of, furthcoming upon this arrestment, compareance was made for Alexander Hamilton, solicitor at London, who claimed preference upon an assignment to Lord Rothes's bond, granted by Captain Wilson to him September 1750, for a valuable consideration. He insisted upon two grounds of preference, *1mo*, That Captain Wilson, who, residing in England *animo remanendi*, is not subjected to the jurisdiction of the Court of Session; and, consequently, that Fairholm's arrestment, founded on a null decree, is equally null. *2do*, That an arrestment is only a prohibitory diligence, which bars the common debtor from doing any voluntary deed in its prejudice, but cannot have the effect, more than an inhibition, to prevent the compleating of any right or deed granted by the common debtor before the arrestment.

With regard to the *first*, it was premised, That, of old, jurisdiction was for the most part personal, whence the power of repledging; that while such was the law, the *locus originis* was almost the only circumstance that founded a jurisdiction; that as commerce came to be diffused, which formed new connections among different nations, and, in places of trade, brought a confluence from all nations, personal jurisdiction lost ground, and at last gave place to territorial jurisdiction. *Voet de judiciis*, § 91. cites many authorities to prove, that birth singly does not produce a *forum competens, excepto solo majestatis crimine*.

Captain Wilson, though originally a Scotsman, has been long in England *animo remanendi*, by which, equally with a native, he is subjected to the law of England. The law of nations admits of change of place, and consequently of subjection. It would be hard for England, in particular, if this were not admitted; and it would be intolerable for a man who changes his country, to be still subjected to laws where he has no residence, and where he has no goods.

But, whatever may be thought in general, change of residence has always been admitted in countries belonging to the same Sovereign. Birth, without residence, gives no jurisdiction to a Sheriff; and the case ought to be the same betwixt the English and Scotch Judges. And, after all, is it not absurd to give a decree against a man, which the Court has no authority to put in execution, considering that neither the person of the defender, nor his effects, are within their territory? Now, if Captain Wilson, cited at the market-cross of Edinburgh, pier and shore of Leith, would not be bound to answer in an ordinary process.

brought against him before the Court of Session, a decret of registration cannot be more effectual ; and consequently execution upon that decret is void.

No 27.

Upon the *other* point it was *urged*, That though an assignment in England is only a procuratory *in rem suam*, as formerly in Scotland, which does not complete the transmission, yet that the assignee has the only equitable title, upon which he, and he only, can oblige the debtor to pay ; that an arrestment can be no bar to the payment, because it only prohibits the debtor from paying to the cedent, or to any deriving right from him after the arrestment ; but does not prohibit the debtor to pay to any person having right prior to the arrestment.

The assignee was preferred, without distinguishing upon what ground.

If it was upon the latter point, which appears to be well founded, it must overturn an established practice of preferring an arrestment to a prior assignation not intimated till after the arrestment,

Sel. Dec. No 80. p. 104.

1761. July 28.

ALEXANDER SHARP, Merchant in Edinburgh, *against* JOHN, ALEXANDER, ANDREW, WILLIAM, MARY, SUSAN, and CATHARINE WOOD, and their Trustees.

No 28.

JOHN WALKINSHAW, late of Scotstoun, being attainted for his accession to the rebellion 1715, his estate was decreed, in virtue of the clan-act, to belong to the Earl of Eglinton his superior, who thereafter conveyed it to the Earl of Galloway, then Lord Garlies,

This case was a competition betwixt an assignation and an arrestment, in which the assignee was preferred, on account of want of title in the arresters.

Mr Walkinshaw had granted a personal bond in 1728 to William Wood, for L. 751 Sterling ; and as Lord Garlies had no intention of taking any advantage from his conveyance to the estate of Scotstoun to the prejudice either of Mr Walkinshaw or his creditors, his Lordship, after fitting an account with Mr Wood, from which it appeared that he was creditor to the extent of L. 20,000 Scots, including the foresaid bond, did, upon the 7th of August 1738, grant an heritable bond upon the estate for that sum, upon which infestment immediately followed.

William Wood having died in March 1747, his eldest son, Captain John Wood, made up titles to the above heritable bond, and was infest in April 1751, upon a precept of *clare constat* from the Earl of Eglinton the superior ; but, prior to this, viz. upon the 30th of January 1749, a minute of sale had been entered into betwixt the said Captain John Wood as in right of his father, and William Crawford as in right of his father Matthew Crawford, (who was another very considerable creditor to Mr Walkinshaw, and had, in consequence of a decret-arbitral betwixt Lord Garlies and him, got into possession of the estate), on the one part ; and Richard and Alexander Oswald, merchants in

No 28. Glasgow, on the other part; whereby, in consideration of L. 4450 Sterling, whereof L. 2650 were to be paid to William Crawford, and the remaining L. 1800 to Captain Wood, they became bound to convey the said lands of Scotstoun to the Messrs Oswalds, with all right or interest, debts and diligences, they had affecting them.

Ann Blair, the relict of William Wood, was decerned and confirmed executrix to him; and the inventory comprehended, *inter alia*, the bond for L. 751, which had been granted by Mr Walkinshaw in 1728.

In 1752, a contract was entered into betwixt Mr Wood's relict and children, whereby they agreed to settle their several shares of his succession in certain proportions; and as the whole of his subjects stood in the person of his eldest son the Captain, and Ann Blair the widow, it was mutually agreed that they should denude and convey the same in favour of certain trustees therein named, for the common behoof of all parties. This was done accordingly; and Ann Blair, by deed of assignment in February 1753, transferred to the trustees the several debts and sums therein mentioned, and particularly the above bond of L. 751 granted in 1728.

Upon the 16th of December 1758, Alexander Sharp merchant in Edinburgh lent L. 300 Sterling to the said John Walkinshaw late of Scotstoun, and for security thereof obtained an assignment to a bond for the like sum of L. 300, which had been granted to him by James Walkinshaw of Walkinshaw and his curators, bearing date the 10th of the same month.

This assignation was of even date intimated to Mr Archibald Campbell of Succoth, one of James Walkinshaw's curators; and the notary's instrument bears, that Alexander Sharp's procurator had protested, that Mr Campbell should intimate the assignation to the minor and his other curators, and procure a letter or acknowledgement from them, that they held the same as a legal intimation.

Mr Campbell transmitted the schedule of intimation by the same night's post to James Walkinshaw's mother, in order that she might notify the assignation to her son and the other curators.

Mr Campbell's letter came to the lady's hand upon the 18th of December, and next day she and her son signed a docquet at the foot of the schedule in the following words: 'Walkinshaw, December 19th 1758. We the above James Walkinshaw of Walkinshaw, and Mrs Margaret Walkinshaw his mother, and curatrix *sine qua non*, do hereby hold the above notification and intimation to the above Archibald Campbell to be equally sufficient to all effects as if made to ourselves; as witness our hand, date and place above mentioned.'

Upon the same day an arrestment was used in the hands of Mrs Walkinshaw and James Campbell of Blytheswood, in virtue of a horning at the instance of the trustees for the relict and children of the before-mentioned William Wood, upon the bond for L. 751 granted by John Walkinshaw in 1728; and a copy of

the arrestment was left with the lady to be delivered to her son, he not being then at home.

Mr Walkinshaw of Walkinshaw and his curators brought a process of multiplepoinding; and a competition arose betwixt Alexander Sharp the assignee, and the trustees of the relict and children of William Wood the arresters.

Pleaded for the arresters, 1mo, The docquet at the foot of the schedule of intimation does not mention the hour when it was signed; therefore, supposing the intimation liable to no objection, the signing of the docquet by Mrs Walkinshaw and her son must, *presumptio juris*, be held to have been in the last hour of the day, and consequently posterior to the arrestment, which was used between the hours of one and three in the afternoon; nor can this presumption be elided by the oath of the arrestees.

2do, The docquet is neither holograph of Mr Walkinshaw nor his mother; and, being destitute of all the legal solemnities, it is altogether improbate, and can afford no evidence of their accepting the schedule as sufficient intimation of the assignation; nor can their after acknowledgement be received to supply that defect to the prejudice of third parties, however available it might be in a question with themselves.

3tio, Intimation of an assignation, in whatever form, must be made to the debtor himself; and no intimation to third parties, however connected with him, can be sustained as an equivalent: But, in this case, the intimation was only made to one of his curators in Edinburgh, when he himself was in the west country; and though this curator transmitted the schedule to him, the assignation was not sent alongst with it; he could therefore have no proper knowledge of such assignation; so that, however well disposed he might be to give faith to the schedule, importing that the assignation had been intimated to the curator, that was no such intimation as the law can regard, which, to complete the right of the assignee, requires that it should be made to the debtor himself.

Answered for the assignee, 1mo, The only end of intimation is to prevent lancy, and to notify to the parties concerned that the debt is transferred; and though this be commonly done by the instrument of a notary, yet the law does not require that precise form, if the fact can be otherwise sufficiently ascertained. Thus the debtors granting a bond of corroboration to the assignee, or his signing witness to the assignation, will be sufficient; nay, an answer by a missive letter to one from the assignee, acquainting him of the assignation, has been sustained as equivalent to an intimation; *McGill contra Hutchinson*, No 64. p. 860. That it is not always necessary that the notification be made to the debtor himself, is also clear from the judgment of the House of Peers, in the case of *Aberdeen against Creditors of Merchiston*, No 73. p. 867. In that case, the Earl of Aberdeen had lent L. 1000 Sterling to Merchiston, and had got an assignation in security to a bond granted by Lord Blantyre, and some gentlemen who had joined in purchasing the estate of Keir. The Earl's doers neglected to intimate this assignation until Merchiston's affairs went into disor-

No 28. der, and arrestments were used by other creditors: But, in a competition with these arresters, it was pleaded as equivalent to an intimation, that the assignation had been shewn to Mr Hamilton of Dachmont, who was manager for the purchasers of the estate of Keir; and that he had entered the notification of the assignation in the book in which he kept the transactions relating to the purchase of that estate. The Court of Session over-ruled this plea, and found, that the private notification to the factor entered in his books was not equivalent to an intimation to the debtor; and therefore preferred the arresters: But, upon an appeal, this judgment was reversed, and the Earl was preferred upon his assignation. This case is surely much narrower than the present, in which the assignation was most regularly intimated to Mr Campbell, and immediate notification given by him to the debtor and his mother, who certified it under their hand the very next morning, several hours before the arrestment was attempted.

Nor can it have any influence, that the docquet containing the debtor's acknowledgement is not a deed probative in law. The question here does not regard the establishing a formal obligation requiring witnesses properly designed; but only the evidence of a fact, whether the assignation was truly notified. This fact has been allowed to be proved by missive letters, receipts of annual-rents, and other documents not attested by witnesses. Had the docquet been holograph of the debtor, the case would not have admitted of a dispute; and as both he and his mother concur not only in acknowledging their subscription, but also in attesting the truth of the fact therein set forth, it does not appear where the objection can lie; a writ of which the subscription is acknowledged must have the same effect with a holograph writing; and no other person can have a title to object nullity on account of its not being wrote by the signer.

2do, The debt due to William Wood became heritable by the security granted by Lord Garlies in 1738; it therefore belonged to Captain Wood the heir, and could not be taken up by his relict's confirmation; so of consequence the assignation granted by her to the trustees in 1753 was *a non habente*, and could not entitle them to use any diligence.

Replied to this objection, 1mo, The bond granted by John Walkinshaw was originally moveable; and though Lord Garlies in 1738 granted an heritable bond of corroboration, the nature of the original debt was not thereby altered. John Walkinshaw still remained debtor by the bond 1728; and it was competent to use diligence upon it as upon a moveable bond.

2do, Supposing the debt to have become heritable by the security granted in 1738, that security was extinguished by drawing the above L. 1800 out of the price of the lands of Scotstoun in 1751, and a renunciation granted to the purchasers; so that nothing now remains but the original bond to Mr Wood, upon which his representatives are entitled to sue as a moveable debt for the balance still due.

3tio, The agreement betwixt Mr Wood's relict and children in 1752, by which the heir and the relict were bound to denude in favour of the trustees, makes it the same thing to them, whether the right was supposed to be vested in the heir or in the relict. The assignation from her must, in consequence of that agreement, be considered as granted with the consent of the heir ; and is therefore equivalent to a direct assignation from him.

Duplied for the assignee, 1mo, Nothing is more certain than that an heritable security granted to the creditor, at any distance of time, makes the whole debt heritable ; nor does it create any difference, whether the subject over which such security extends be of greater or smaller value. If a creditor should adjudge a subject of L. 100 value for a debt of L. 1000; the whole will become heritable ; neither is it necessary that the heritable security be granted by the principal debtor ; a security of that kind given by a cautioner will make the debt equally heritable as if it had been given by the principal. This being the case, the security granted by Lord Garlies, who held the lands of Scotstoun for the debtor's behoof, and made his debts a burden upon them, must have the same effect.

2do, It can be of no avail that this heritable security was discharged or conveyed to the purchasers, upon their making payment of what could be drawn out of the price. Had this happend during the life of William Wood the creditor, it might have had some effect ; but this was not the case ; the heritable security subsisted in its full extent against the lands of Scotstoun, at the time of his death ; and it is an established rule, that, in dividing a succession betwixt heirs and executors, *Tempus mortis defuncti solummodo est inspiciendum*. If the right was heritable at that time, no after change can make the succession, which has once devolved to the heir, to fall to the executor ; no title could therefore be made to this debt by confirmation ; and it might with equal propriety be said, that an heir could take by service, a debt which was left moveable by the defunct, because an heritable security had been granted to his executor after his death.

3tio, The contract 1752 will not support the assignation made by the relict to the trustees. It is true, that, by this contract, both the heir and the relict as executrix agreed to denude themselves of the heritable and moveable subjects severally vested in them. But there was no agreement that the heir should convey the moveables, and the executrix convey the heritage. Suppose that A and B, being each possessed of a land estate, should agree to dispone their respective estates to a trustee for certain purposes, and that A by mistake should dispone B's estate ; such conveyance could not have the effect to vest the property in the trustee, or to entitle him to apply to the superior for an entry, or to maintain any action against a third party ; yet this case is perfectly similar to the present. The assignation from the relict is therefore good for nothing,

No 28.

as being granted *a non habente*; and the debt in question, to which the heir had made up a special title by a precept of *clare* and infeftment, could be conveyed by him only.

'THE LORDS preferred the assignee.'

For the Assignee, *Ferguson*.

For the arresters, *Lockhart*.

N. B. THE LORDS seemed to determine this case upon the want of title in the arresters, the trustees of William Wood's relict and children.

A. W.

Fac. Col. No 50. p. 112.

Douglas against Mason,
voce TRUST.

*** See Douglas against Mason, 29th June 1796, *voce TRUST*, in which an arrestment and an assignation were ranked *pari passu*, where the execution of the former bore to have taken place between one and two, and the intimation of the latter between two and three of the afternoon of the same day.

SECT. IV.

Arresters with Annualrenters.

1670. February 1.

WILSON against RUSSELL.

No 29.

Rents due by a tenant were arrested after his removal from the lands. Found that an annualrenter who had done diligence, by which he might have poinded the tenant before his removal, was preferable to the arrester.

WILSON being infest in an annualrent of the lands of , and having obtained a decret of poinding the ground thereafter, Russell being a creditor, did arrest the mails and duties in the tenants' hands which were due to the master; and pursuing to make arrested goods furthcoming, the tenant being removed off the ground with his whole goods, it was *alleged* for Wilson, That he ought to be preferred, because his decret of poinding of the ground was before the arrestment, and being a real diligence, did affect the whole duties payable to the master. It was *answered* for Russell, That the tenant being removed with the whole goods, such decreets and letters being only to poind the ground and the goods thereon, could not affect him nor his goods.

THE LORDS did prefer Wilson the annuitant, and found, he having done prior diligence, whereby he might have poinded the tenant before he removed, albeit he did prejudge himself of all the execution against the tenant's goods, after they were off the ground; yet, *quoad* the duties payable to the master, for which he might pursue him *personali actione*, he was not prejudged from the benefit thereof by the tenant's removal; but, the decret of poinding of the ground, and letters thereof, being a real execution prior to the arrestment, made him preferable to the arrester as to the duties for which he was liable to the common debtor.

Fol. Dic. v. 1. p. 178. Gosford, MS. No 241. p. 99.

1748. November 2. LADY KELHEAD *against* JOHN WALLACE, &c.

No 30.
Right in security by infestment preferred before arresters of the rent.

SEVERAL creditors of Sir John Douglas of Kelhead, having arrested his rents of Kelhead, were called in a multiplepounding, where compearance was made for the Lady Dowager of Kelhead, claiming preference, by virtue of her infestment, for security of a life rent annuity of 2000 merks; and containing an assignment to the rents, with her husband's personal obligation to pay her the said annuity. Hitherto she had not been in possession of the land, having depended upon the personal obligation for her payment; and she had not attempted a pointing of the ground.

The arresters arguments for preference were these: A right of property carries the rents as an accessory, which therefore may be demanded from every intromitter. An infestment of annualrent does not, *per se*, carry the rents more than the land itself; though it is a means of acquiring both by a decree of pointing the ground. An infestment of annuity is of the same nature with an infestment of annualrent: they are not rights of property, but only servitudes upon land; and the infestment *per se* is not a title to levy the rents, more than to enter into the natural possession of the land itself. And thus says Lord Stair, tit. Infestment of Annualrent, § 6. speaking of the several sorts of rents known in the law of England: 'Rent-charge is that which not being by *red-dendo*, yet is so constitute that the annualrenter may, *brevi manu*, point the ground therefor. We have no such annualrent, for we admit of no distress without public authority; but all execution must proceed by decret and precept.' And, in a case similar to the present, observed by Durie, *Gray contra Graham*, No 1. p. 565. it being pleaded for the annualrenter, that though he had a right to point the ground, he was not thereby deprived of his right to the rents, and that it was in his option to take himself either to the one or to the other; and it being answered, That the naked infestment gives not an action against the tenants for their rents, but only an action for pointing the ground; the COURT preferred the arrester to the rents, seeing the annualrenter had not a pointing of the ground. Nor can the creditors find a contrary decision upon record; for, in the case observed by Durie, *Guthrie contra Earl of Galloway*, No 4. p. 567. where a process was sustained at the instance of an annualrenter even against intromitters with the rents, a decree of pointing the ground had passed, which was the *ratio decidendi*; for the LORDS were of opinion, that by taking possession upon a decree of pointing the ground, the rents became the property of the creditor, and might be claimed from every intromitter. This certainly was a stretch, and which has not been followed in practice; but the creditors are not concerned, as it does not touch their case. One case more shall be cited from Fountainhall, *Kinloch contra Rochead*, No 7. p. 569. which stands thus: An infestment of annualrent is no sufficient title whereupon to pursue a personal action for rents, unless an assignment to the

No 30. rents be contained in the annualrent-right ; but an annualrenter, after obtaining a decree of poinding the ground, finding her execution disappointed by the goods being privately carried off the ground, the LORDS, in a new process for the rents, found the tenant liable personally for them to the extent of the goods that were upon the ground at the time of the citation in the poinding of the ground ; because the subject was thereby rendered litigious.

These things being premised, it was *urged* for the arresters, That the Lady must found her preference either upon her real right of annualrent, or upon the assignment to her of the rents ; if, upon the latter, the arrestment must be preferred, unless the assignment had been intimated before the date of the arrestments ; if, upon the former, a right of annualrent, without a decree for poinding the ground, so far from being a ground of preference, is not even a title to levy the rents.

The Lady, upon her annualrent-right, might as well pretend to compete with adjudgers of the land, as with arresters of the rents. She has no title either to the land or to the rents, but by a decree of poinding the ground ; when she proceeds to this execution she will be preferable as to both ; but without it, she has no better title to the rents than to the land.

‘ THE LORDS unanimously preferred the annuitant.’

Elchies did not distinguish a right of property from a right of annualrent ; *contending*, That by a right of annualrent, all that grows on the ground is the property of the annualrenter, to the extent of his debt ; and that a poinding of the ground does not bestow any new right, being only necessary, like a process of mails and duties to a proprietor, to force the tenants to pay ; because neither can force payment *brevi manu*. Arniston added, that according to the doctrine laid down by the arresters, an annualrenter is not in safety to take payment voluntarily from the tenants, but must insist in a poinding of the ground, which would make an infeftment of annualrent a very troublesome security, because of the many informalities that this execution is generally attended with.

Elchies further *observed*, that in the competition of the creditors of Naughton, there were several annualrenters, some of whom had a disposition of the property, some not, and that all were preferred to the arresters.

The seeming difficulty of this judgment is, that upon an annuity or annualrent-right an action of mails and duties is not competent against the tenants, unless they have agreed to pay their rents to the creditor. And if so, what title has the annuitant to compete with the arresters about rents to which she has no right ? To this the solid answer is, that though she cannot claim the rent directly, yet she can poind the tenant's goods to the extent of the rent, for payment of her annuity ; and in this situation it would be unjust to oblige the tenants to pay their rents to the arresters, unless they should be warranted against the poinding of the ground.

Rem. Dec. v. 2. No 94. p. 165.

* * * D. Falconer reports the same case :

No 30.

PART of the horses belonging to St George's regiment of dragoons having been grazed, for the summer season 1746, in Sir John Douglas's parks of Kelhead, arrestments of the grass mail were used by his creditors in the hands of the officers, who, upon their departure, consigned L. 180 Sterling in the hand of the Sheriff-depute. And other arrestments being laid on, he raised a multiplepoinding, in which compearance was made for Dame Helen Erskine, the Lady Dowager, craving preference on an infestment of annuity for 2000 merks Scots; she having also a personal obligation therefor, with an assignation to the mails and duties to that extent; but no decret of poinding the ground, nor any possession of the lands.

Pleaded for the arresters, The Lady must found her preference, either upon her infestment, or her assignation to the mails and duties; and upon neither can she affect the arrested rents. An infestment of annualrent, or of annuity, which is similar to it, is not a title of possession, nor yet of an action of mails and duties, but singly the foundation of an action of poinding the ground, by means whereof the debt may be recovered, but without which the rents cannot be touched; Gray against Graham, No 1. p. 565. And the Lady cannot claim preference on her assignation to the mails and duties, unless it had been intimated prior to the arrestments.

Pleaded for the Lady, An annuity differs from a right of annualrent, in that it implies a liferent of the lands to the extent thereof; but, even in an annualrent, the infestment gives a preference upon the estate, and rents of it; and, the only necessity of poinding the ground, is to force payment, if the tenants are refractory, but without it the preference may be determined, and payment taken, if it can be got.

THE LORDS preferred Lady Douglas on her infestment.

Reporter, *Tinwald.*

For the Arresters, *H. Home.*

Clerk, *Kirkpatrick.*

D. Falconer, No 1. p. 1.

SECT. V.

Arresters with Disponees.

1633. November 22.

WARNOCK against ANDERSON.

ONE Warnock having obtained decret against Hamilton of Peill, and his tenants, before the commissary of Hamilton, decerning the tenants to make the

No 31.
An arrester
was preferred
to a wadset-

No 31.
ter, because
his sasine,
which was the
only ground
of a complete
real right to
the lands, was
after the ar-
restment.

farms addebted by them to the said Hamilton of Peill, their master, of the crop 1631, forthcoming, for payment of a debt owing by him to the said Warnock; and the tenants suspending that sentence, compeared in the suspension, one Anderson, who by contract had acquired the heritable right of these lands from Peill, before the arrestment execute by Warnock; which contract contained a back-tack set to Peill by Anderson; likeas, before the arrestment upon the said contract, a charter was also subscribed, and albeit sasine thereon was not expedite while after the arrestment, and albeit the sasine was also after the terms of payment, yet he *alleged*, he ought to be preferred to the arrester, in the farms controverted, so far as concerns the back-tack duty, contained in his heritable contract foresaid, seeing the sasine ought to be drawn back to its own cause, viz. to the contract and charter, and the intervening arrestment can be no impediment thereto, no more than an inhibition intervening before the sasine execute by another creditor, would have derogate to the validity of the right and sasine subsequent to the inhibition, the said sasine depending upon a cause anterior to the inhibition, which sasine he could not take the time of the contract and charter, seeing the lands held ward; and before he purchased the superior's confirmation, he could not adventure to take sasine; therefore he *alleged*, that he ought to be preferred to the arrester in the farms, in so far as his back-tack duty did extend unto; for, by the tack foresaid, the tenants were, in effect, become his tenants, and the arrestment could not affect the back-tack duty, which pertained to this party excipient, and not to Peill the arrester's debtor; notwithstanding whereof, the LORDS preferred the arrester to the wadsetter, in respect the sasine, which was the only ground of a complete real right of the land, was after the arrestment, and in prejudice of the said arrestment, it could not give him right to that year's farm, and albeit a creditor's inhibition could not have hindered the party to perfect his heritable right, which had a true and real preceding cause, yet the arrestment was not alike, which behoved to work upon an existent body, which then fell not to be claimed, but by an heritor in-feft; and therefore Anderson's allegiance was repelled, for the duty of the back-tack acclaimed.

Act. ———.

Alt. Gibson.

Clerk, Gibson.

Fol. Dic. v. 1. p. 179. Durie, p. 693.

No 32.

An arrester
of the mails
and duties was
preferred to
another credi-
tor who had
a disposition
of the lands
for security
of his debt,
but without

1642. June 24.

LO. FORRESTER against CASTLELAW.

In a double pouding betwixt the Lord Forrester, and one Castlclaw, where Castlclaw having arrested in the tenant's hands, the farms addebted by them to the Laird of Grange their master, for satisfying of a debt owing to Castlclaw by their master; and the Lord Forrester claiming to be preferred to the said Castlclaw, because before the arrestment, the lands, for most onerous causes, were disposed to him, conform whereto he is in possession, by holding of courts. Castlclaw *answered*, That the disposition ought to have no respect, no real right

by charter and sasine having followed thereupon, and the disposition containing no clause whereby the farms controverted were assigned to him; likeas, notwithstanding thereof, the L. of Grange remained in possession of the lands, and uplifted the farms and duties thereof continually, whereby this year controverted, the farms arrested by him, ought to be paid to him, as pertaining to his debtor, and cannot be claimed by the Lord Forrester, by this disposition, which remained *in nudis finibus obligationis* without sasine, and he having done no legal diligence to recover payment thereby. THE LORDS repelled the Lord Forrester's allegiance, and preferred Castlelaw's allegiance, and admitted the same to his probation, that the debtor retained the real possession of the said lands, and that the Lord Forrester had no real possession of the lands, nor real right, and repelled the allegiance of anteriority; neither did they respect that part concerning his possession, qualified by holding of courts.

Act. Herriot.

Fol. Dic. v. i. p. 179. Durie, p. 896.

No 32.
sasine, without possession (unless by holding of courts,) and without being assigned to mails and duties.

SECT. VI.

Arresters with Executors-Creditors.

1623. March 9. MUIRHEAD against MUIRHEAD'S CREDITORS.

JAMES MUIRHEAD in Hamilton, ~~debtor to umquhile~~ William Muirhead burges of Edinburgh, in a sum of money, suspends upon double pointing, as being charged by two creditors of the said William Muirhead, viz. on the one part by James Hope, and Mr William his assignee, who for the debt owing to the said James Hope, by the said umquhile William, had convened the nearest of kin of the said umquhile William, who by the law would be his executors, and upon whose renouncing to be executors, he had obtained decret against them *cognitionis causa*, decerning the bonds to be registrated, that execution might pass thereupon *contra bona jacentia*; and thereafter he had obtained himself decerned executor to the said William Muirhead, to the effect he might be paid off his debt in the first place, which was sustained by the Commissaries, and thereupon he intents action against this suspender. And sicklike the suspender was charged by William Dick burges of Edinburgh, another creditor of the said umquhile William Muirhead, who was anterior in debt and term of payment to the said James Hope; likeas his bond was registrated against the said William Muirhead, in his own time, and before his decease; and the same sum

No 33.
An arrestment used in the lifetime of the debtor, but not followed out, postponed to the posterior right of an executor-creditor.

- No 33. controverted, was arrested at his instance in this suspender's hands, and sensyne the registrate obligation transferred in the person of Hope, executor decerned to the said umquhile William, whereby he alleged that he ought to be preferred, both in respect of the anteriority of his debt, and greater diligence, to Hope.—THE LORDS preferred Hope to Dick, in respect that Hope had recovered the first sentence against the persons, who of the law represented Muirhead, their common debtor, and that he had done diligence also, by obtaining himself decerned executor to him; which gave him *jus praelationis* for his debt, seeing the decret and arrestment used against Muirhead in his own time by Dick ceased, nothing being done thereupon before his decease; and so the decret of registration, obtained while he lived, not being transferred, while after Hope's decret of registration, and that Hope was decerned executor, made Hope's diligence to be greater than his, and so to be preferred to Dick.

Act. Hope.

Alt. Stuart.

Clerk, Scot.

Duric, p. 58.

No 34.

1681. January 21. RIDDELL against MAXWELL.

AN arrester pursuing furthcoming, after the common debtor's decease, was preferred to an executor-creditor of the defunct, who had confirmed the debt arrested, as *in bonis defuncti*, and had even gone so far as to obtain decret against the debtor in whose hands the arrestment was laid.

Fol. Dic. v. 1. p. 179.

. See The particulars of the case, No 113. p. 783.

No 35.

Decided in conformity with Riddell against Maxwell, *supra*.

1688. February.

HUME against HAY.

A DEBTOR having died after one of his creditors had arrested, another creditor confirmed the sum arrested, and competed in the furthcoming; but the LORDS preferred the arrester, the arrestment being a *nexus realis*, which could not be prejudged by the debtor's death, more than real rights of poinding the ground, &c. by virtue whereof goods might be poinded after the debtor's death, in prejudice of both an executor and donatar, (as was found in a pursuit before the Council, betwixt the Lady Hume and John Hay.)

Fol. Dic. v. 1. p. 179. Harcarse, (ARRESTMENT.) No 94. p. 18.

1688. June 29.

ROBERT RUSSEL *against* LADY BALINCRIEFF, and the TENANTS of Carnock.

IN the multiplepointing betwixt Robert Russel, who had obtained a decreet of furthcoming against the Tenants of Carnock, of some rents arrested in their hands, as belonging to Balincrief *jure mariti*, and the debtor's relict,

Alleged for the Relict, That she, as executrix-creditrrix, ought to be preferred to Russel, who should have confirmed the debt arrested after her husband's death, and her confirmation was before the decreet of furthcoming.

Answered, Arrestment is *nexus realis*, and cannot be evacuated by the debtor's death; *2do*, The subject arrested was not at first confirmed in the principal testament, but only eiked; and the decreet of furthcoming is prior to the confirmation of the eik, and there was no protestation to eik.

THE LORDS found the decreet of furthcoming to be prior and preferable complete diligence. But if the confirmation of the rents had been anterior to the decreet, they would probably have decerned in favour of the relict; yet an executor not *qua* creditor, could not compete with one arresting, before the debtor's decease, though his decreet of furthcoming were posterior to the confirmation.

Fol. Dic. v. 1. p. 180. Harcarse, (ARRESTMENT.) No 95. p. 18.

No 36.

An arrestment, laid on before the common debtor's death, with a decree of furthcoming obtained after his death, preferred to the claim of an executor-creditor, who was confirmed before the decree of furthcoming, but had not eiked the subject in controversy till after.

1732. July 20.

CRAWFORD *against* SIMSON.

IN a competition betwixt an arrester [upon a dependence, and another creditor, who, after the common debtor's death, confirmed the arrested subject as executor-creditor; the LORDS preferred the executor-creditor *hoc statu*, he finding caution to make the sums furthcoming to the arrester, in case the arrester's claim should be purified. See APPENDIX.

No 37.

Fol. Dic. v. 1. p. 180.

1742. June 22.

CARMICHAEL *against* ANNA MOSMAN, Relict of HARDY.

HARDY assigned to the Treasurer of the Bank, a debt due to him by M^rKenzie of Rosend, in security of a debt he owed the Bank.

Robert Carmichael, another creditor of Hardy's, arrested in the hands of the Treasurer, and pursued a furthcoming; wherein the Treasurer declared that the Bank was noways debtor to Hardy, but was creditor to him in the sum of L. 30 : 5s; Sterling per bill, in security whereof he had assigned to them a debt due to him by M^rKenzie of Rosend, which assignation bore this quality, That in case the Bank should recover more than what was due to them, they should

No 38.

The confirmation by an executor-creditor, completed before decree of furthcoming be obtained on a prior arrestment, is preferable to the arrestment.

No 38. be accountable to him for the same; and that no payment was yet recovered: After which the furthcoming lay over.

Meantime the Bank recovered payment of the debt due by Rosend, whereby they became debtors to the heirs of Hardy, now dead, in a balance, whereof the relict of Hardy getting notice, confirmed the same as executrix-creditrrix to him, and brought her action against the Bank for payment; whereupon Carmichael wakened his furthcoming, and insisted upon preference upon his arrestment. It was *argued* for the executrix-creditrrix, That the arrestment in the hands of the Bank could carry nothing, because the Bank was not debtor in any sort to Hardy at the date of the arrestment.

But the LORDS found no occasion to give any judgment upon that point, having, upon the report, taken up the question upon a point that had not been pleaded for the party, viz. they found, ' That the confirmation by the executrix-creditrrix being compleated before the decree of furthcoming, the executrix-creditrrix was preferable; and preferred her accordingly.'

It is likely, that the executrix would also have been preferred upon the above point pleaded for her, had the Lords proceeded on it, agreeably to what is to be seen *supra*, voce ARRESTMENT, Creditors of Gordon *contra* Sir Harry Innes, No 51. p. 715. And as to the points upon which the Lords took up the case, the judgment now given was contrary to the former reported decisions, viz. Riddel *contra* Maxwell, No 34. p. 2790. and No 35. same page, both observed by Harcarse; for which reason, probably, it had not in this case been pleaded by the lawyers for the executrix. Yet the LORDS, in a full Bench, were so unanimous that the other party did not reclaim.

Kilkerran, (COMPETITION.) No 3. p. 137.

SECT. VII.

Assignees with Executors-Creditors.

1669. July 27.

EXECUTORS OF MR THOMAS RIDPETH *against* JOHN HUME.

No 39.

An assignee having neglected to intimate during the decedent's life, an executor-creditor of the defunct

IN a competition betwixt the executors-creditors of Mr Thomas Ridpeth, about a sum due to Mr Thomas by bond, and by him assigned to John Hume, who not having intimate it in Mr Thomas's lifetime, did thereafter get payment of a part of the same, and a bond of corroboration for the rest thereafter;—Torrowdlie, for a debt due to him by Mr Thomas Ridpeth, confirms himself execu-

tor-creditor to Mr Thomas, and *alleges*, That he ought to be preferred, because the assignation made to John Hume was an incomplete right, wanting intimation; so that the sum remained *in bonis* of Mr Thomas Ridpeth, and that he had followed the only legal way to affect it, by confirming himself executor-creditor to Mr Thomas; and albeit the assignee may force any other executor to pay him, yet not an executor-creditor, who is executor to his own behoof for satisfying his debt.—It was *answered*, That the assignation, though not intimate, being a special assignation, albeit it cannot have execution by horning, yet it is the undoubted ground of an action, even after the defunct's death, against the debtor, and no executor-creditor can have right thereto.

Which the LORDS found relevant, and preferred the assignee.

Fol. Dic. v. 1. p. 180. Stair, v. 1. p. 647.

* * Gosford reports the same case:

In a competition betwixt John Hume and Pringle of Torwoodlie, who should have best right to a bond of 2000 merks, due by Rentoun of Billie, Hume craved preference, as being assignee made to the bond by the creditors, and payment of a part thereof, made conform; and Pringle craved to be preferred, as being executor-creditor confirmed to the creditor, who, albeit he had given an assignation to Hume, yet the same was never intimate during his lifetime; and so it remained *in bonis defuncti*.—THE LORDS preferred the assignee, and found, That an assignation, albeit not intimate during the cedent's lifetime, was not null, but the assignee might pursue the debtor after the cedent's decree; yet as to the quot due to the Bishop, the assignee was liable; and this was found in this case, in respect the assignee had intimate, by getting payment of a part of the bond before the executor-creditor was confirmed; otherwise it would have been altered.

Gosford, MS. p. 78.

1726. July 5.

Competition betwixt SINCLAIR of Southdun and SINCLAIR in Brabsterdoran.

SINCLAIR of Southdun, executor-creditor to the deceased James Sinclair, clerk to the bills, confirmed a debt due by James Murray merchant in Leith, and upon this title competed with Sinclair in Brabsterdoran, to whom James Murray's debt had been conveyed by the creditor James Sinclair, but never intimated.

For the executor creditor it was *pleaded*, That an assignation without intimation, is like a disposition without infeftment; they import equally a personal action against the author, but are by no means a conveyance; the author is not denuded until intimation or infeftment; in demonstration whereof, the author can again assign or dispoise the subjects; and the first intimation or infeftment

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No 39.

confirmed the subject, as still *in bonis defuncti*. The Lords preferred the assignee.

No 40.

An assignee neglecting to intimate during the cedent's life, an executor-creditor of the defunct confirmed the subject as still *in bonis defuncti*. It was found to be a valid confirmation, and preferable to the posterior intimation of the assignee.

No 49.

will be preferred, which could not be, were the author denuded by the simple assignation or disposition; for upon that scheme, the second would be *a non habente potestatem*, and consequently null. The subject therefore remains with the cedent, until intimation by the assignee, conveyable again by his voluntary alienation, and affectable by his creditors.

On the other side, it was *pleaded* for the assignee, That nothing can be understood as *in bonis defuncti*, but what belonged to him before his death, what in a strict sense he could call his own, and as such, dispose upon at his pleasure. Now, for this reason, a sum assigned, though there is no intimation, is not *in bonis defuncti*, the defunct did all in his power by the assignation to alienate; and if the intimation was further necessary, that was the work only of the assignee. In a word, it is inconsistent that a subject be considered as mine, which I have done the utmost to alienate, and which I cannot therefore dispose of, or intromit with, without being guilty of a crime. That intimation is a ground of preference among assignees, makes no argument, for that is *in favorem* only of the diligent, contrary to the nature of the conveyances; and were the nature of the rights only considered, the first assignation would undoubtedly be preferred. And this seems to be the plain import of the act of Parliament made in 1690, which declares, "That special assignations, though not intimate in the life of the cedent, are good and valid rights and titles; albeit the sums of money therein contained be not confirmed." For if, notwithstanding such special assignation, the sums of money or goods specially assigned were *in bonis defuncti*, a confirmation by the analogy of our law would be necessary. In the last place, the decision 27th July 1669, Ridpeth *contra* Hume, was adduced, mentioned by Lord Stair, *l. 3. tit. 1. § 15*, No 39. p. 2792.; where this case was determined.

It was *answered*, That the preference given to the first intimation, is from the nature of the thing; the favour of diligence it cannot be, if it be allowed, that his case is less favourable in the way of diligence, who intimated yesterday an assignation he obtained a twelvemonth ago, than his who got but his assignation this day, and intimated the same moment, and yet the first intimation in all cases is preferred; it can only be, therefore, that the cedent is not denuded until intimation; notwithstanding the assignation, the subject remains in his person, which he can validly uplift or assign, as no assignation had been granted; if, indeed, he use this right in prejudice of the assignee, he will be liable upon the personal warrandice in the assignation, which is all the assignee can in law affirm; but he ought to reflect, these two are very compatible, a *right of property* in one's person, and an obligation upon him to transfer that property to another, which he cannot disappoint, without being liable *pro interesse*. *Answered* to the argument drawn from the act 1690, Though the subject truly continues *in bonis defuncti*, notwithstanding an assignation unintimated, it will not follow, that the assignee must be confirmed, the intimation without more, taking the subject out *ex hereditate jacente mobilium*, and establishing it fully

in the assignee : And in this, an assignation is similar to a disposition or adjudication, upon which infestment taken after the death of the disponent or debtor establishes the subject, which in the *interim* was in *hereditate jacente*, completely in the person of the disponent or adjudger. As for the decision cited, the circumstances are not the same ; there the assignee had got a bond of corroboration, and a partial payment after the cedent's death, which has been always reckoned equal to an intimation. To conclude, the subject in dispute remained in *bonis defuncti*, notwithstanding the unintimated assignation. The confirmation was the first completed conveyance, taking the subject out *e medio* ; and upon that title, the executor-creditor falls to be preferred.

' THE LORDS preferred the executor-creditor.'

Fol. Dic. v. 1. p. 180. Rem. Dec. v. 1. No 87. p. 175.

No 40.

1775. March 8.

PEREGRINE CUST *against* FRANCIS GARBET and Company.

UPON the death of Ebenezer Roebuck merchant in London, one of the partners of the Carron Company, which happened at Carron on the 9th of October 1771, a competition ensued respecting his share in the co-partnery stock of the Carron Company, computed to be worth about L. 6000 Sterling.

Mr Cust founded upon an assignment from the said Ebenezer Roebuck, dated the 16th May 1770, to his share of the stock in the above Company, subject to the proviso, that the same should be redeemable upon payment of L. 3350 Sterling, and interest thereof, upon the 16th May 1771 ; but, if not paid before that time, the right was to be absolute. This assignment had not been intimated during the lifetime of Roebuck the cedent ; but, after his decease, was intimated on the 29th day of October 1771, to two of the residing partners of the Carron Company at Carron. And, upon the 30th October, betwixt the hours of eight and nine in the morning, it was intimated by Mr Cust's factor to Charles Gascoigne, for himself as a partner, and as acting manager for the Carron Company, within the Company's office at Carron ; where he attended for that special purpose, in consequence of his own proposal to Mr Cust's factor, and the notary, who were with him at his house at Carron-wharf, the preceding evening, in order to have intimated the same to him then.

Francis Garbet and Company of Carron-wharf, being also creditors, did, upon the 17th day of the said month of October 1771, take out an edict from the commissaries of Edinburgh, for confirming themselves executors-creditors to the said Ebenezer Roebuck ; and, after the preliminary steps, a confirmation was expedite in their favour, bearing date the 30th day of October 1771, in which they gave up, for the particular subject of that confirmation, the sum of L. 6000 Sterling, as the supposed value of Ebenezer's share of the co-partnery-stock of the Carron Company.

No 41.

A competition between an assignment intimated after the death of the cedent, and a confirmation of an executor-creditor, expedite upon the same day, was found to be regulated by priority of the hour.

No 41.

Garbet and Company maintained two different pleas. They insisted for a total preference in their favour upon the following grounds; 1st, That the assignment itself to Mr Cust is intrinsically null and void, in respect of the irregular execution thereof; 2^{dly}, in respect of alleged irregularities in the intimation of the assignment upon the 30th October: But there appeared to be no relevancy in either; and the counsel for Garbet and Company, after one judgment of the Court had gone against them, consented to restrict their plea to a *pari passu* preference with their competitor.

Argued on this head; That they do not dispute that principle of the Roman law, when kept within proper bounds, *quod vigilantibus non dormientibus, jura subveniunt*, but the propriety of the application of it to the case in hand.

As the genius of the law of this country, as of all other commercial states, founded upon principles of material justice and equity, favours an equal distribution of the effects of a bankrupt amongst his whole creditors; whatever shall be the judgment of the law upon the authority of former precedents and opinions, in a competition between assignees and arresters, specifying the precise hours when they were severally executed, or *in poenam* of that party who neglected to specify the hour in his execution; an extension of these to the case of an executor-creditor, who has it not in his power to specify the hour of his confirmation, would be as adverse to the general principles of equity and justice, as it is unsupported either by precedents or authorities.

It is a known fact, that the usual and stated time for the meeting of the commissary court, is ten of the clock in the forenoon; and as no opposition was, or could be made to the confirmation as executors-creditors, their being decerned executors required no time; and as the subject meant to be confirmed was but one single article, viz. Ebenezer's share of the stock in the Carron Company, the confirmation might forthwith be expedite; and the presumption of law is, that every thing was regular and fair. So that, for any thing that does or can appear, allowing the assignment to have been intimated at the hour of nine, which, at any rate, is doubtful and uncertain, and the confirmation to have been expedite after the hour of ten, or between ten and eleven, the bare possibility, or even probability of the one being an hour or thereby prior to the other, would be too slender a ground upon which to establish the preference contended for by Mr Cust, and to exclude the other party from a rateable proportion of the sole effects in this country, which they were *in cursu* of attaching, in the only method competent to them by law.

It is thought to be a clear case, that, as the law stood before the making of the statutes 1690, cap. 26. and 1693, discharging transferences *active*, a special assignation, not intimated in the cedent's lifetime, could have been no bar to any other creditor confirming that particular subject, as *in bonis* of the defunct at his death. The exemption granted by the first to such special assignee from the necessity of confirming after the death of the cedent, being qualified by the words immediately following, 'Without prejudice always to the

competition of creditors and others, and of their rights and diligences as formerly, before the making hereof,' can be no bar to the confirmation of an executor-creditor, or any ground of preference to the assignee, in competition with such executor-creditor; and, therefore, as an unintimated special assignation, as the law formerly stood, gave no preference in competition with other creditors confirming the subjects assigned, which remained *in bonis* of the defunct, the concession made by the defenders, (upon supposition of the assignment's being regularly intimated) that Mr Cust should come *in pari passu* with them on Ebenezer's share of the stock of the Carron Company, was all that in equity he could demand, and more than by law he was entitled to.

But this is not the only ground upon which the defenders do maintain their plea to a *pari passu* preference.

It is a clear case, that the unintimated assignation did not denude Ebenezer Roebuck of his share in the stock of the Carron Company; so that, at the period of his death, it remained *in bonis* of him, attachable by his creditors. It is equally clear, that the only method known in the law by which it could be attached, was by confirmation as executor-creditor; so that, when the defenders were in *curru diligentia*, and in *actu proximo* of having their confirmation expedite, before that Mr Cust attempted to intimate his assignation, they were following out the only course that the law allowed to operate their payment, by the attachment of that particular subject, which, therefore, could not be frustrated by intimating the assignation at that conjuncture.

Argued for Cust: In England, of which he is a native, and where he has resided all his life, the intimation of an assignation is unnecessary, and in fact is never practised. By the assignment, the equitable and substantial right was transferred to him; and, therefore, it would have been a hard case, if, through the neglect of a mere piece of form, and which Mr Cust did not know to be necessary till after Ebenezer Roebuck's death, the competitors had carried off for a debt of Ebenezer's, a subject to which they knew they had no right, but, on the other hand, knew perfectly well that, equitably and substantially, it belonged to Mr Cust.

That a *pari passu* preference of creditors has any foundation in the common law of Scotland, is absolutely denied. This *pari passu* preference is entirely the creature of statute; and, therefore, it cannot be extended to cases not provided for by statute. The general rule of the law of Scotland is, (and which must hold at this day in every case where the contrary is not expressly provided by statute) that *vigilantibus*, &c. and that *prior tempore potior jure*.

With respect to the merits of the points at issue, it is a clear case, that it is the confirmation alone that vests the right. The serving the edict, and even the decree-dative, vests no right whatever; so it was decided 23d January 1745, Carmichael *contra* Carmichael, *voce* SERVICE and CONFIRMATION; and, since that time, the point is understood to be fixed and established.

N^o 41.

The assignment was granted in favours of the pursuer about 16 months before Mr Roebuck's death. It is plain, that no step taken by any of his creditors could prevent the pursuer from going on and completing his right by intimation; and, therefore, the question comes to this, Whether there is satisfactory evidence, that the intimation which was made betwixt eight and nine o'clock in the morning of the 30th of October, was prior, in point of time, to the confirmation that was expedite that day before the Commissaries of Edinburgh?

But, even in the case of competition in arrestments, it is by no means sufficient to create a *pari passu* preference, that the steps of diligence of the respective creditors happened upon the same day. Where, indeed, both appear to have been done upon the same day, and where no mention is made of the time of the day, as to any of them, no other rule of decision can be adopted but to prefer both *pari passu*; but, where the time of the day is mentioned, the preference must be regulated accordingly.

It is likewise an established rule, that, where one makes mention of the hour of the day, and the other does not, that in a competition the creditor is preferable, the execution of whose diligence makes mention of the particular hour. And, indeed, the principle of law by which questions of this kind fall to be governed, does not require two hours, nor even one hour, or half an hour, in order to give a preference. Any priority whatever is sufficient, if the judge shall be satisfied that there was a priority in point of time; and if the fact be certain that there is a priority, a priority of ten minutes is just as good as a priority of ten hours. The intimation of the assignation did vest the right fully and absolutely in the person of the assignee. The subject did not thereafter remain *in bonis defuncti*; and consequently, a confirmation expedite after the *hereditas jacens* of the defunct was denuded by an intimated assignation could carry nothing: And it can make no difference whether the *hereditas jacens* was denuded ten hours or ten minutes prior to the confirmation.

It is certain, however, that the usual time of meeting of the Commissary Court is not earlier than 11 o'clock; yet, supposing it was ten, as the defenders have stated, it is perfectly clear that the confirmation was long subsequent to the intimation, and that, in place of one or two hours, which has been found by the Court to give a preference, many hours must have intervened in fact: And, independently thereof, the pursuer behoved to be preferred upon the other ground above stated, viz. that the intimation makes mention of a particular hour, whereas the confirmation makes mention of no hour; and in every such case it is held to be clear, that the former falls to be preferred.

The difference supposed betwixt the case of judicial proceedings, and the execution of legal diligence, or the intimation of assignations, upon which the defenders seem chiefly to rest their plea, can by no means vary the rule of division. A confirmation of an executor-creditor falls to be considered as a step

of legal diligence, for establishing the creditor's interest in the defunct's effects ; and, in all competitions, where the contrary is not established by statute, the clear rule of law, and which holds universally, is, that *prior tempore est potior jure*. The law in such cases does not mean to establish a *pari passu* preference. Such preference arises only *ex necessitate*, when it does not appear, with any reasonable degree of certainty, that the one was prior to the other : And therefore, before the defenders can claim *pari passu* preference with the pursuer, it is incumbent upon them to show, that their step of diligence was equal, in point of time, with the intimation of the assignment ; whereas this they have by no means done. The pursuer's instrument of intimation proves, that the same was made betwixt the hours of eight and nine in the morning of the 30th of October ; whereas, the defenders confirmation, which mentions no hour, proves no more, as Lord Stair very properly expresses it, *but once that day*.

The present question must be regulated by the law as it now stands ; at the same time, it is apprehended, the defenders are in a mistake in supposing, that prior to the 1690, or 1693, a special assignment could not be intimated after the death of the cedent.

But all this is an investigation of very little moment in the present question. The pursuer does admit, that, even subsequent to the statutes 1690 and 1693, if a creditor should confirm a debt that had been specially assigned by the defunct, before the assignment was intimated, that he would fall to be preferred to the assignee ; but, on the other hand, it is equally clear, that if the assignment was intimated prior to the confirmation, even although the intimation was made after the death of the assignee, the assignee would be preferable to the creditor confirmed ; and the sole question here is, Whether the intimation of the assignment, or the confirmation, was prior in point of time ?

It is perfectly untenable to maintain, and for which there is neither precedent nor decision, that, because a creditor is *in cursu diligentia*, therefore a third party is not at liberty to complete a right which he had obtained from the debtor, before the creditor had proceeded to any step of diligence whatever. Such third party can never be interpellated, by any step of diligence against the common author, from completing a right which he derived from that author, at a time when he was at perfect liberty to dispose of the subject in what manner he inclined.

THE COURT, by two consecutive judgments, adhered to that of the Lord Ordinary, which found, ' That the intimation of Cust's assignment being made to the acting manager and partner of the Carron Company, by delivering him a schedule at their office at Carron, was sufficient ; and in respect it appears, from the instrument of intimation produced, that the same was made to the acting manager at the Carron Company's office, between the hours of eight and nine in the morning of the 30th October 1771, and that it is not denied, that the hour of cause in the Commissary Court is not till 11 o'clock in the forenoon ; finds, That the assignment in favour of the said Peregrine Cust was completed.

No 41.

by the said intimation, before any step was, or could be taken upon the edict in the confirmation in favour of Garbet and Company; and, therefore, prefers Cust upon his interest produced.'

Act. M^cQueen.

Alt. D. Faculty, Lockhart.

Clerk, Ross.

Fol. Dic. v. 3. p. 154. Fac. Col. No 169. p. 74.

S E C T. VIII.

General Assignees with Creditors.

No 42.

1663. July 3

GORDON against FRAZER.

A disposition by a husband to his wife, of his moveables upon a particular estate, was found sufficient to defend the relict in her possession of those moveables, against an executor-creditor pursuing for them.

GORDON having confirmed himself executor-creditor to Forbes of Auchinvil, pursues — Frazer, his relict, for delivery to him of the moveables, who *alleged* absolvitor, because the moveables upon the Mains of Auchinvil were disposed to her by her umquhile husband.—It was *answered*, That the disposition was simulate, *inter conjunctas personas retenta possessione*, and therefore null.—It was *duplied*, That the disposition was upon an onerous cause without simulation, because it bears to be in respect that, by the defunct's contract of marriage, he is obliged to infest his wife in five chalders of victual out of Auchinvil, for the aliment and entertainment of his younger children, till the age of 14 years; and because he was necessitate to sell that land, therefore he disposed the moveables in lieu thereof, which is also instructed by the contract of marriage.—The pursuer *answered*, That this is but a provision to children, and could not be preferred to the defunct's creditors, especially being a provision before the children were existent; and if such were to be allowed, it were easy, upon such latent provisions in favours of children, to prejudice creditors.—The defender *answered*, That if the pursuer's debt had been anterior to the contract of marriage, he might have had ground upon the act of Parliament 1621; but this debt was posterior to the contract, and there was no reason to hinder a parent to provide his children, and dispone moveables to him in satisfaction thereof.—The pursuer *answered*, That both being yet but personal obligements, not having obtained effectual possession, the creditor, though posterior, must be preferred to the children, especially if the defunct have not sufficient estate to pay both; *2dly*, The disposition is upon a false narrative, because the lands of Auchinvil are yet undisposed.

THE LORDS found, That the childrens' disposition ought to be preferred, unless the father were *insolvendo*, at his death; in which case they preferred the

creditors, though posterior ; and likewise found the allegiance relevant, that the narrative was false, and so the disposition without a cause. *See* PROVISIONS to HEIRS and CHILDREN.

Fol. Dic. v. 1. p. 180. Stair, v. 1. p. 195.

No 42.

1713. November 26.

MARY BORTHWICK against ELISABETH WOOD.

By contract of marriage betwixt Patrick Cunningham, cooper in Leith, and Elisabeth Wood, all moveable sums that should happen to be owing, and other goods and gear that should pertain to Patrick at his decease, were provided to belong to Elisabeth in the event of her surviving him without children of the marriage ; and that it should be lawful to her, after her husband's decease, to intromit and dispose thereon without confirmation ; which contract, Mary Borthwick, Patrick Cunningham's mother, did ratify, by a writ subscribed by her on the back thereof. The said Patrick Cunningham having died without children, and Mary Borthwick obtained a decret-dative as creditrix to him, pursued Elisabeth Wood his relict to give up inventory of her husband's moveables, in order to expedite a confirmation ; who offered a bill of advocacy to the Lords upon iniquity committed by the Commissaries, in finding that Elisabeth Wood ought to give up inventory of the whole goods and debts of the defunct ; albeit she was not only an onerous assignee, in her contract of marriage, to all her husband's moveables, with power to intromit therewith immediately after his decease without confirmation, but also Marion Borthwick had consented to and ratified Elisabeth Wood's right in its full extent.

No 43.

A general disposition by a husband to his wife, in their contract of marriage, with power to intromit after his death without confirmation, found to give the wife no preferable right to the creditors of the decease, and not to hinder them from affecting the estate with diligence.

To which it being *answered* for Marion Borthwick, That a general disposition of all goods and gear the disponent should have the time of his decease, implying tacitly *deductis debitis*, can never give the receiver a preferable interest in her husband's effects, or take effect, after his decease, to exclude his lawful creditors from affecting the subject, which behoved to be confirmed as in *bonis ejus*, and might have been pointed in his lifetime ; nor can Marion Borthwick's ratification of the contract hinder her to affect the husband's moveables, for payment of a just debt contracted after the contract.

THE LORDS refused the bill of advocacy from the Commissaries.

Fol. Dic. v. 1. p. 180. Forbes, MS. p. 6.

1724. July.

STIRLING against LAURIE.

In a general assignation to the wife, of heritable and moveable subjects, intimated, after the husband's decease, to a debtor, from whom she uplifted several years annualrents of an heritable bond ; the LORDS preferred an adjudication deduced after intimation, in respect the general assignation was not confirmed. *See* SERVICE and CONFIRMATION.

No 44.

Fol. Dic. v. 1. p. 180.

VOL. VII.

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1732. July. CHILDREN OF LORD KIMMERGHAM *against* His CREDITORS.

A GENERAL assignation of moveables, with a power to intromit and enter to possession immediately upon the granter's decease, though possession be apprehended accordingly, is not sustained in our law as a transmission of the property, but these goods must be confirmed; and, without confirmation, the disposition, though clothed with possession, will be found no better right than a *jus crediti* for the value. The reason is, that the power to apprehend possession is a procuratory, *quod perit morte mandantis*, as procuratories did with regard to land rights before the act of Parliament; and, if confirmation be necessary, the assignee can stand upon no better footing than any other creditor. Thus, an assignation, in a contract of marriage to the wife, of the whole household plenishing that should belong to the husband the time of his decease, was found only to make the wife creditor for the value upon the implied warrandice, so as to bring her *in pari passu* with other creditors confirming within six months; but she was found to have no preference, though she got into the natural possession after her husband's decease, and also confirmed the subject prior to any step of diligence by the creditors. See SERVICE and CONFIRMATION.

Fol. Dic. v. I. p. 180.

1794. June 6.

JAMES HARDIE DOUGLAS, and Others, *against* The TRUSTEE for the Creditors of THOMAS HAY.

No. 46.

An assignation to a sublease, in security of debt, intimated to the principal lessee, but on which no possession had followed, found to be a valid ground of preference in competition with personal creditors of the cedent.

THOMAS HAY granted assignations of a sublease of a farm possessed by him to James Hardie Douglas and two other creditors, as a further security for debts due to them. None of the assignees entered into possession. Upon Hay's being made bankrupt, in terms of the act 1696, two of them intimated their rights to the principal lessee; the other did so, soon after, but not till Hay had executed a trust-deed in favour of his creditors. The deed declared, that the rights and preferences which creditors had already acquired should not be affected by it.

The trustee having sold the sublease, brought a multipoleinding against the creditors, that their claims on the price might be ascertained. The assignees, none of whom had acceded to the trust, claimed a preference. The other creditors had executed no diligence against the estate of the bankrupt. The trustee for their behoof

Objected; An assignation to a sublease is ineffectual in a competition of creditors, unless it has been followed by possession; Ersk. b. 3. tit. 5. § 5.; Bank. b. 3. t. 1. § 16.; Stair, b. 3. t. 1. § 8. Intimation to the principal lessee, even although not liable to the objection of having been made after the bankruptcy

of the cedent, cannot supply its place. The sole object of intimation is to prevent a debtor from making payment to his creditor after the latter has transferred his right; but the principal lessee, instead of having any thing to pay to his subtenant, has rent to receive from him. It would be dangerous to allow latent deeds, like the present, to give a preference over creditors who had contracted with their debtor on the faith of his being still proprietor of the subject. An assignation of moveables, without transference of possession, is presumed to be collusive, and is therefore ineffectual in a competition of creditors. Kames's *Eluc.* art. 2. The same rule should apply to a lease, which is a mere personal right, although by statute made effectual against singular successors.

Answered; The trustee is in no better situation than the personal creditors for whom he acts. His right is derived, not from any legal diligence affecting the subject, but from a voluntary deed executed by a bankrupt after two of the assignations were intimated; and which deed was not completed by intimation, or by any public act equivalent to it, till the other assignation had likewise been intimated. At the time the trust-deed was executed, the assignees were entitled to have entered into possession; and they would have done so, if the trust-deed had not expressly declared, that it should not affect the rights or preferences which creditors had already acquired.

An assignation to a lease, not followed by possession, may perhaps be insufficient to prevent the subject from being carried off by a more complete right; but there is no reason why it should not convey a valid personal right. A lease is in reality a personal contract between the landlord and tenant; and when the latter is allowed to assign, the assignation, as in the case of any other personal subject, is completed by intimation to the only other party concerned, *i. e.* to the landlord, or, as in this case, to the principal lessee. The presumption of collusion from an assignation *retenta possessione*, holds only in moveable subjects; Forbes, p. 275. 27th July 1708, Boigs against Watson, *vide* PRESUMPTION.

The bankruptcy of the debtor is no objection to the intimation, as no diligence had been raised against his estate by the other creditors. Indeed, intimation was altogether unnecessary in this case; for although, in competitions between different assignees, the preference depends upon the date of the intimation, in those between assignees and other creditors, the former rank according to the dates of their assignations; 8th July 1785, *Hay contra Sinclair*.*

THE LORD ORDINARY sustained the objections to the interest of the assignees, as being 'assignations to a lease *retenta possessione*, and not intimated till after 'the bankruptcy of Thomas Hay.'

A petition against this interlocutor was followed with answers. The Court ordered memorials; upon advising which, it was

Observed on the Bench; The trust-deed is reducible on the act 1696; at any rate, it was not intended to affect the rights which creditors had already acquired. The assignees must therefore be preferred to the trustee.

16 H 2

* Not reported. See APPENDIX.

No 46.

Possession is so far essential to the conveyance of a lease in security of debt, that without it the assignee has only a personal right, consequently a subsequent assignee or adjudger getting first into possession would be preferred. At the same time, were a process of adjudication to be brought, the assignee might insist to be put into possession before the right of the adjudger could be completed, and a summary application to the Judge Ordinary to that effect would be competent.

The intimation, in the present case, had no effect in completing the right. When the principal lessee assigns his lease, the right of the assignee is completed by intimation to the subtenants, requiring them to pay their rents to him; when again the subtenant is the granter of the assignation, the right of the assignee can only be completed by actual possession of the subject, though, in the mean time, an intimation to the principal lessee may be proper in order to render the transaction public. It is no objection to the intimation, that it took place after the bankruptcy of the cedent. That event does not prevent creditors from taking any step for their own safety, which can be done without the intervention of their debtor.

THE LORDS, by a considerable majority, 'altered the interlocutor reclaimed against, repelled the objections to the interests produced for the petitioners, (assignees), 'and preferred them upon the funds *in medio*, arising from the sale of the lease.'

A reclaiming petition was refused without answers, on the 24th June 1794.

Lord Ordinary, *Stonfield*.
D. D.

For the Assignees, *Dav. Williamson*. *Alt. Montgomery*.
Fol. Dic. v. 3. p. 152. Fac. Col. No 122. p. 272.

SECT. IX.

Assignees with Apprisers and Adjudgers.

1637. *March 2.* SMITH *against* HEPBURN and BARCLAY.

No 47.

Assignation intimated, preferred to a posterior comprising, although the denunciation was made before intima-

ONE Barclay having made Geills Smith assignee to a bond of money addebt- ed to him, after which assignation, one Hepburn, creditor to Barclay, having denounced this bond to be comprised; after which denunciation, the prior as- signee intents summons against the debtor of the sum assigned for the payment thereof to him as assignee, which he alleged to be a sufficient intimation, and whereby he craved preference to the-compriser, who, although he had denoun-

ced before his said intimation, yet seeing he was assigned long before, and had summoned the debtor assigned, which was his intimation, before the completing of the comprising, his prior intimation, before the comprising, and prior assignation, before the denunciation, ought to give him preference; even as if one had acquired an heritable disposition of his debtor's lands, if any other creditor had thereafter denounced these lands to be comprised, before he had perfected charter and sasine upon that prior disposition, the said denunciation and comprising following thereon, would never have preferred him to the said prior disposition, and charter and sasine perfected thereafter. THE LORDS preferred the prior assignee, being a lawful creditor, albeit a conjunct person, to the said posterior comprising; and found the denunciation made by the comprising before the intimation of the assignation, was no just cause to give the comprising preference to the assignee, but sustained the said assignation, although intimate after the denunciation, which denunciation, the Lords found did not affect the sum to the denouncer, nor made it to be so real, but that notwithstanding thereof, the assignee might perfect his intimation effectually thereafter; and yet an arrestment after assignation will be preferred to that assignation, if not intimate before.

Fol. Dic. v. 1. p. 180. Durie, p. 834.

No 47.
tion of the assignation; because a denunciation does not affect the sum, nor make it so real, but that the assignee may effectually perfect his intimation thereafter.

1750. November 16. THOMAS WALLACE against CAMPBELL of Inveresragan.

ARCHIBALD CAMPBELL vintner in Inverary, having built a large inn for promoting his business, obtained from the Duke of Argyle a tack, commencing at Whitsunday 1740, to endure for three nineteen years, at the old tack-duty of 50 merks. Having contracted considerable debts, and being pressed with diligence, particularly at the instance of John Somervil, merchant in Renfrew; Campbell of Inveresragan, his brother, agreed to take off his debts upon getting a proper security; and the only one that could be given was a conveyance to the said tack, with the household plenishing. The plan concerted was, that Archibald should have a sub-tack for eleven years at a moderate rent, in which time, it was hoped, that the profits of his business might relieve him from his debts; and Somervil was brought into the concert, who consented to accept of L. 7 Sterling yearly from Archibald out of the rent to be paid by him to his brother for the sub-tack. This tripartite agreement was executed in the following manner: A disposition is granted by Archibald to his brother Inveresragan, dated 31st October 1741, which, after narrating the several debts above mentioned, extending to the sum of L. 324, 12s. Sterling, and subsuming that Inveresragan had agreed, upon getting the disposition, to relieve the disposer of the said sums, and for that effect to make payment thereof; 'therefore, for Inveresragan's further security, and better enabling him to make payment of the said sums, Archibald assigns to him his above mentioned tack

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A person assigned a tack of a house to his brother, and his brother became bound to relieve him of his debts, some of which, however, he concealed. The brother granted him a sub-tack for a moderate rent. A creditor afterwards adjudged the tack. The brother pleaded preference on his assignation, alleging he was in possession by his sub-tacksman. The adjudger was preferred.

No 48. ' from the Duke of Argyle, with the whole insight and household plenishing within the same, all specially condescended on in an inventory subjoined to the disposition.' Of even date, Inveresragan grants eleven years sub-tack to Archibald of the subjects contained in the disposition, at the yearly rent of L. 12 Sterling, whereof L. 7 to be paid to John Somervil. And Archibald, in order to make this rent effectual, became bound to relieve his brother of the tack-duty of 50 merks payable to the Duke. This transaction was not kept a secret; it was publicly known to the whole town of Inverary; and the assignment of the tack to Inveresragan was recorded in the sheriff-court books of Argyle, 19th November 1741.

In this transaction, Archibald dealt unfairly by his brother. Beside the said debts, which were reckoned the whole he owed, he was debtor to Thomas Wallace merchant, by bills, in no less than L. 100 Sterling, upon which adjudication was deduced in November 1742. In a mails and duties upon this adjudication, Inveresragan produced his interest. There was also produced a receipt by John Somervil to Archibald, of John's part of the sub-tack duty; and as for Inveresragan's part, it appeared to be more than exhausted by an open account of furnishings which Archibald made to him. Inveresragan insisted for preference upon his assignment to the tack, which was completed according to the nature and intendment of the transaction.

The chief, or rather sole objection to the assignee's preference was, that to allow property to be transferred in this slight manner, without inverting the possession, would be hurtful to commerce; that by such latent rights, creditors may be entrapped, and particularly, that Archibald might have given assignments to twenty different persons of this tack, in the same manner that he gave it to his brother, without affording opportunity to the assignees to know of one another.

In answer to this objection it was premised, that, by the original law of this land, derived probably from the Roman law, it is a maxim, that *nudo consensu rerum dominia non transferuntur*; the property of a moveable is transferred by delivery *de manu in manum*, and of an immoveable by introducing the purchaser into possession. But after subaltern rights upon land came in use, such as real servitudes, securities for money, &c. few of which admitted of natural possession, symbolical possession came to be established with regard to property itself, as well as all other rights affecting land; after which, nothing was more common than to establish real rights, without inverting the natural possession; witness a disposition of property reserving the granter's liferent, a wadset granted with a back-tack to the proprietor, a disposition in security, an heritable bond, &c. This, it is acknowledged, proved inconvenient for commerce; and therefore, those who had real rights upon land were directed to put their sasines upon record, which is a great security to the lieges.

With regard to *nomina debitorum*, it is probable that, originally, they were transferred singly by assignment, without the necessity of any other step to

complete the transmission ; but this being found inconvenient to commerce, a hint was borrowed from symbolical possession in heritable rights, to make intimation to the debtor necessary in order to complete the right in the assignee's person.

As to tacks, there are two methods of completing them, applicable to their different kinds. A tack of land is made real and complete by apprehending the natural possession, until which it remains a personal right ; whereby a posterior tack upon which possession is first apprehended, will be preferable. But in a tack which admits not natural possession, such as a tack of mails and duties, intimation to the tenants is the only method for completing the right ; and therefore, the tack which is first intimated to the tenants will be preferred ; and the same holds in an assignment to such a tack.

The present question is, Whether the sub-tack granted by Inveresragan to his brother Archibald, did complete his own assignment to the principal tack, so as *funditus* to denude Archibald the cedent, and to bar both his legal and voluntary assignees ? This assignment cannot be put upon the footing of a tack of land to be completed by possession ; for an obvious reason, that it was an express article in the agreement, to leave the cedent in possession. The apprehending possession then as a means to complete the transference being excluded, there remained no other means but to intimate the assignment to Archibald the sub-tenant, who, by the covenant, was to remain in possession. And that this was the natural way of completing the right, must be evident from considering, that the assignment was in effect no other than an assignment to a tack of mails and duties, at least for the eleven years that Archibald was to continue in the natural possession. Had Archibald, before he assigned to his brother, sub-set the tenement, there cannot be a doubt that an intimation to the sub-tenant was the proper form of completing the assignment. If so, must not an intimation to Archibald himself, who was the sub-tenant, be held sufficient ? It cannot make a difference, that Archibald, in this case, was both cedent and sub-tenant ; such coincidences are not unusual in law, and the case is always understood to be the same as if there were really two persons, instead of one who sustains the part of both.

The only question that remains, is, Whether Archibald the tacksmen's assignment to his brother, was not in all views equivalent to an intimation made to him as sub-tenant ? It would be ludicrous to use the form of intimation to the man who is himself the granter of the right.

One of two things must necessarily follow ; either the assignment thus known to the debtor, must be a complete right *in suo genere* ; or such a transaction, however honest and fair, is ineffectual in law. The latter proposition cannot be maintained, if it be the purpose of law, which it undeniably is, to support and carry into execution every honest and fair transaction. Nothing therefore remains but to acknowledge the truth of the former proposition, viz. that the as-

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signment was complete *in suo genere*, since it was in effect intimated to the sub-tenant by his being a principal party in the transaction.

Supposing a danger to commerce by such private transactions, it is however the province of this Court, to square their decisions by principles of law, leaving consequences to the legislature. At the same time, the danger to commerce is but a bugbear, especially in the case of a tack of an urban tenement, which is merely a personal contract, and not a real right of the lowest kind. Suppose Archibald Campbell had sublet his house at L. 20 Sterling yearly, a higher rent than it will bear, an assignment to his brother of the tack intimated to the sub-tenant, would be a complete conveyance; and yet all this might be kept secret from Archibald's creditors. Nor is there any thing here but what occurs daily in the transmission of personal bonds. Creditors, it is true, may be entrapped; but the law must have its course till records be established for personal as well as real rights, if ever such a regulation be found convenient. It is true, that two persons are concerned in these transmissions, the debtor as well as the creditor; which affords greater opportunity of discovering the truth. But if this consideration weigh with the Court, another case shall be put, precisely similar to the present. An heritor, who is in the natural possession of his own estate, has a long tack of his teinds for an elusory tack-duty, which he assigns to a third party for an onerous cause. In the *first* place, this assignment needs no intimation, because the only person to whom it can be intimated is the granter himself. In the *next* place, here is a transaction in which as few persons are engaged as in the present. Tacks of teinds may be extreme lucrative rights, and yet whatever danger there may be to commerce, the supposed assignment is a complete right the moment it is delivered. Another example is a wadset, with a back-tack to the heritor, by which a man may be denuded of his estate, and yet matters remain, *quoad* possession, *in statu quo*. The records do not alter the law in this particular, but only put the lieges upon their guard. It is then no principle, that the inverting of possession is necessary for establishing a complete right, whether of property or of tack; and if so, the introduction of records, which are not extended to tacks, cannot vary the argument. The principle of law must stand as it did; and, if any argument can be drawn from the records, it can only be, that the records are imperfect, by not comprehending tacks.

Mr Wallace endeavoured to apply the law regarding base infeftments to this case; and it was asserted, that where lands are disposed, reserving the granter's liferent, the granter's possession, though a quality in the right, is not sufficient to complete the disponee's base infeftment. But it must be extremely obvious, that base infeftments regulated by the act 105, Parl. 1540, have no analogy to the present case, which falls not under the statute, in whatever view it be taken. At the same time, the statute gives no authority for maintaining, that the granter's possession, where his liferent is reserved, is not sufficient to complete the disponee's base infeftment; which, in effect, would be maintaining, that a base

infetment, however onerous or honest, is not capable to be made a complete right, where the granter's liferent is reserved. The statute concerns only base infetments so constituted as that possession may be apprehended; and establishes a presumption of collusion from the forbearing to apprehend possession. But it would be absurd to infer collusion from forbearing to apprehend possession, when, by the tenor of the transaction, the disponee is barred from the possession. And for this very reason it was found, that a base infetment is sufficiently completed by the granter's possession, where the liferent is reserved, 16th January 1730, Barclay of Busbie *contra* Gemmil, No 49. p. 1316.

' THE COURT notwithstanding preferred the adjudger to the assignee.'

Fol. Dic. v. 3. p. 154. Rem. Dec. No 116. p. 235.

* * Kilkerran reports the same case :

THOMAS WALLACE merchant in Glasgow, being creditor to Archibald Campbell vintner in Inverary in certain bills, whereon he had done diligence by horning and caption in July 1741, did thereafter, in November 1742 obtain an adjudication of a beneficial tack his debtor had of some tenements in Inverary from the Duke of Argyle, for the space of three 19 years, for payment of 50 merks of tack-duty; and having thereon pursued an action of mails and duties, compearance was made for Colin Campbell of Inverasragan, who produced a disposition from the said Archibald his brother, bearing date in October 1741, whereon he craved to be preferred.

For understanding the grounds on which Wallace repeated a reduction of this disposition, it is necessary to know, that it proceeded upon a recital of several debts due by Archibald Campbell to sundry persons, to the amount of L. 324 Sterling, whereof only L. 61 Sterling was due to Inverasragan himself, and subsuming, that Inverasragan had become bound, by his acceptation of the disposition, to relieve his brother thereof, and that the said sum of L. 324 was agreed upon to be the adequate value of the subjects thereby disposed, therefore Archibald disposed the tack of the tenements possessed by him, with his whole household plenishing, to Inverasragan, for his security and relief. The disposition bore delivery of the tack, and of certain pieces of the household furniture as symbols of the whole. With that same breath Inverasragan, without taking any possession himself, grants a sub-tack back to Archibald of both house and furniture for eleven years, at the rate of L. 12 Sterling yearly, L. 7 whereof was to be paid to one of the creditors, whose debt made part of the L. 324 which Inverasragan had undertaken, and L. 5 to Inverasragan himself, with an obligation over and above, to relieve Inverasragan of the 50 merks of tack-duty payable to the Duke of Argyle.

This being the fact, the reasons of reduction of this disposition insisted on by Wallace were, *imo*, On the second alternative of the act 1621, as a partial

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preference to his brother and the other creditors, in prejudice of his ultimate diligence done some months before its date. *2do*, Upon the common law, as being a disposition *omnium bonorum* to his other creditors, in prejudice of the pursuer. *3tio*, Supposing the disposition not reducible on either of these grounds, he insisted to be preferred thereto upon his adjudication as being the first complete right in so far as his adjudication had supervened before any possession had been obtained by Inverasragan upon his assignation.

To the *1st*, it was *answered*, That the case did not fall under either of the alternatives of the act 1621; not the first, as the disposition is fully onerous; not the 2d, because upon most of the debts which Inverasragan had undertaken, and particularly that due to himself, ultimate diligence had proceeded prior to the pursuer's diligence, nay, before his debt was contracted, and therefore the pursuer could not say, in terms of the act of Parliament, that the disposition was granted in prejudice of his more timely diligence. And as to such of the debts, on which more timely diligence had not been done, it was *answered*, That as these debts not previously due to Inverasragan, but debts which he at that time undertook, the security given for relief of these no more fell under the act of Parliament, than if it had been a security for money borrowed at the time. To the *2d*, it was *pleaded* as a speciality in this case, which distinguishes it from the common case of dispositions *omnium bonorum*, when the granter is thereby rendered *insolvent*, that here the very purpose of the disposition was to prevent his insolvency, as it gave him an opportunity to carry on his trade. And to the *3d*, That as Archibald the disponent was in the natural possession of the tenement disposed, the sub-tack granted back to him by the disponent did complete the disponent's own right, so as to bar all posterior assignees of the disponent voluntary or legal.

The Ordinary having reported this case, THE LORDS, without taking any notice of the first two points, took it up upon the third; but as the fact had not been so fully stated upon it as it ought to have been, remitted to the Ordinary to enquire, Whether there had been any rent paid by Archibald the sub-tacksman, either to Inverasragan the disponent, or to the creditor, who, by the disposition, was to get L. 7 of it, or what evidence Inverasragan could give, that any part of the yearly rent payable to the Duke of Argyle had been paid on his account, as assignee to the tack, or that he was enrolled as tacksman in the Duke's rental.

But, upon the Ordinary's again reporting, that no evidence could be brought of any of these particulars prior to the pursuer's adjudication, THE LORDS, of this date, 'preferred the adjudger to the assignee, and remitted to the Ordinary to proceed accordingly;' and afterwards, on advising petition and answers, 4th January 1751, 'adhered.'

This transaction was considered as fully onerous, and the project fair and generous on the part of Inverasragan, in order to enable his brother to carry on his business; but the decision went upon the abstract principle in law, and

whereof the pursuer was even in equity entitled to take the advantage, his debtor having omitted to take in his debt in the list, though Inverasragan may have been ignorant thereof. Transmissions of every subject of whatever kind must be completed by some public act that may come to the knowledge of third parties, and without which the transmission will be incomplete, be it ever so fair and honestly intended. The transmission of the property of moveables is completed by delivery, of lands by infeftment, of *nomina* by intimation, of tacks and other rights which require no infeftment by possession; and therefore between two tacks, or between two assignations to a tack, or between two sub-tacks, it is the first possession that determines the preference.

So far may be true, that in some cases, when a tack is assigned, the assignee cannot attain the natural possession, as, for example, when a proprietor assigns a tack, whereof years are still to run; but in that case, the civil possession, by uplifting the rents, comes in its place, or, if such assignee shall be considered only as an assignee to the mails and duties during the currency of the tenant's tack, it must, as other assignations, be completed by intimation to the tenant; but, in no case can a transmission be deemed complete, where no act intervenes other than what passes between the granter and receiver, and is known to no body but themselves, which was the present case. And it was thought no good answer, which for Inverasragan was chiefly insisted on, That as it was the very purpose of the disposition, that he was not to have the natural possession, and that consequently he was in effect no other than an assignee to the mails and duties, at least, during the currency of the sub-tack; so the sub-tack being to the granter himself, who was in the possession, there was no other to whom intimation could be made, and therefore, either the transmission ought to be considered as complete, or it must be said, which none would say, that such sort of agreement, however in itself fair and honest, was reprobated in law: For still, as has been said, the civil possession was what completed the right; for, as the remit to the Ordinary supposes payment might have been made of the Duke's rent by the disponent, or he might have been enrolled as the tenant, which ought to have served for intimation.

Kilkerran, (COMPETITION.) No 6. p. 143.

* * D. Falconer reports the same case :

ARCHIBALD CAMPBELL vintner in Inverary, assigned 31st October 1741, to Colin Campbell of Inverasragan his brother, a tack for three 19 years, from the Duke of Argyle, of a tenement in that town, whereon were some old houses, and a new house built by himself; and disposed his household furniture, in payment of his debts to Inverasragan himself and others, of which he undertook to relieve him; and Inverasragan sub-set the same to him for 11 years, for pay-

No 48. ment of the rent to the Duke, and of L. 12 advanced rent to be paid, L. 7 to John Sommerville one of the creditors, and L. 5 to himself.

Archibald Campbell continued to possess; and Thomas Wallace merchant in Glasgow, upon a further debt, of which Inverasragan had not become bound to relieve him, adjudged his tack, 23d November 1742, and pursued a mails and duties, wherein appearance was made for Inverasragan; and in the competition it appeared that the old rent was raised by the Duke's factors, from the possessors of the old houses; that the tenement was entered in the rent-roll by its name, without mention of either of the brothers; that Archibald had made one year's payment to John Sommerville, and some subsequent partial payments, the date of the first receipt being posterior to the adjudication; but it did not appear he had made any payment to his brother, only it was said his children had boarded with him.

Pleaded for the adjudger, This assignation did not transfer the tack, not being clothed with possession: Traditionibus & usucapionibus, non nudis pactis, dominia rerum transferuntur.

Pleaded for the assignee, His right was completed by possession, as his sub-tacksman possess in his name; so that he was in the civil possession: This could not have been doubted, if he had sub-set to a third person who had entered upon it; and it ought to make no difference that the sub-set was to the original tacksman: The rent was paid to the Duke by the sub-tenants; and there was no fraud in this case, the assignation being registered in the Sheriff's books, 19th November 1741.

Replied, The competitor mistakes the argument, which is not fraud, but the incompleteness of the right; there having no inversion been made of the possession; and so was the law with regard to base real rights, when possession was necessary to their completion. A base wadset was not completed by the granter's continuing to possess on a back tack, Stair, p. 209, 11th January 1678, Laurie against Irvine: Lands being disposed, reserving the liferent, the liferenter's possession did not cloath the disposition, 26th June 1739, Bruce against Dury; nor did a disposition from a father to children, while he continued to possess by a factory from them, 10th July 1669, Gardner against Colvill.

THE LORDS preferred the adjudger; and, on bill and answers, adhered.

Act. Ferguson.

Alt. H. Home.

Clerk, Pringle.

D. Falconer, v. 2. No. 176. p. 210.

S E C T. X.

Assignment to Mails and Duties, with other Rights.

1622. December 17. HAMILTON against ALEXANDER.

JANET HAMILTON of Kinbrachmont, obtained decret for a sum of money against Sir William Anstruther, to which George Meldrum being made assignee, comprises the lands of Anstruther upon the 8th September 1621, and arrests the farms and teinds, and calls to have them made furthcoming. Robert Alexander produces an assignation, made by Sir William Anstruther to him, of the farms and teinds of his lands, for payment and relief of certain debts owing by Sir William to him, and for which he was caution for Sir William; and being admitted, *alleges*, That he should be preferred for the farms; because his assignation was in May 1621, anterior to the comprising, and intimated before the sasine taken thereupon.—THE LORDS found, That the comprising having denuded the cedent before any possession could be lawfully apprehended by the assignee, the sasine might be drawn back to the decret.—Alexander *alleged* for the teinds, That the comprising was not *modus habilis*, because Sir William Anstruther was infeft heritably in the teinds, and the compriser had them not adjudged that way, and was not infeft.—THE LORDS, considering that the compriser could not perfectly know the state of Sir William's right, and had only comprised all right he had to the teinds, it was sufficient to sustain this action against the assignee, being a conjunct person, brother-in-law to Sir William, ay and until his right was impugned by a party having more valid heritable right.

Fol. Dic. v. 1. p. 181. Haddington, MS. No 2703.

1627. February 13. SAMUEL against SAMUEL.

IN an action betwixt Samuel and Samuel, for payment of a tack-duty contained in a tack set by John Forrester, heritor of the lands set in tack, and which appointed the duty thereof to be paid to the pursuer, being a creditor to the setter, and which duty was paid diverse years of the tack to the pursuer; the heritable right of the lands being thereafter within the years of the tack, comprised from the setter of the tack; which compriser compeared in this process, viz. the Lo. Corstorphin, and claimed the duties of the tack to pertain to him, by the right of his comprising of the lands.—THE LORDS found, That the compriser had right to the said tack-duty of the years since his comprising, and

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A compriser of lands and teinds, in a competition of mails and duties, preferred to an anterior assignee who had not apprehended possession before the sasine upon the comprising, but had only intimated his assignation after the comprising, and before the sasine.

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A tack being set by an heritor, and therein the tack-duty appointed yearly to be paid, not to himself, but to one of his creditors, by virtue whereof the said creditor

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was in pos-
session, the
Lords prefer-
red this cre-
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not infeft.

not this pursuer, notwithstanding that the tack expressly bore, and appointed the duty to be paid to him; and albeit it had taken effect by possession, before his comprising; for albeit the comprising, during the space of the tack, the same being set, as said is, before the comprising, could not move the tacksman; yet he had right to the tack-duty, seeing the setter of the tack could not appoint the duty to be paid to any other person effectually, so as it could last longer than he himself remained heritor; and his right being comprised from him, the duty could not pertain to that person to whom he had appointed the payment thereof to be made, after his own right was taken from him. The cause being thereafter called, 27th February 1627, the contrary hereof was found, and the tack-duty found due to him to whom the tack was appointed to be paid; which was *de novo* done over again in favour of the tacksman and pursuer.

Act. Stuart.

Alt. —.

Clerk, Hay.

Fol. Dic. v. 1. p. 181. Durie, p. 271.

1628. March 27. LORD BLANTYRE *against* PARISHIONERS of BOTHWELL.

No 51.

A TACKSMAN of teinds having assigned the teind-sheaves, payable by the heritors, in security and payment of a debt; this was found only a personal right, though clad with possession, and was not sustained to compete with a posterior assignee to the tack itself, a tack being a real right.

Fol. Dic. v. 1. p. 181.

*** See The particulars of this case, No 7. p. 1780.

1628. December 13. HUNTLY *against* HUME.

No 52.

THE cedent continuing still proprietor of the lands, notwithstanding of assignation to the mails and duties, must have a power of alienation; and of consequence the purchaser, who has right to the lands, must of necessary consequence have right to the produce of the lands; therefore it is, that the assignee's right to mails and duties, which is only a personal claim against possessors, and no real right in the lands, must fall as soon as the cedent is denuded by infeftment.

Fol. Dic. v. 1. p. 181.

*** See The particulars of this case, No 12. p. 2764.

1632. July 17. LADY BORTHWICK *against* TENANTS of CATKUNE.

IN the cause pursued by the Lady Borthwick against the Tenants of Catkune, found, That a factory granted by the Lord Borthwick to Cuthbert Borthwick, for uplifting his rents, ay and while he were paid of a certain sum owing to him by the Lord Borthwick, was not a real right which might hinder the said Lord to make any disposition of his lands to a third person.

Fol. Dic. v. 1. p. 181. Spottiswood, (FACTOR.) p. 126.

No 53.

A factory to a creditor, to uplift rents till he should be paid, is not good against a singular successor in the lands.

1635. November 28. MORISON *against* TENANTS of ORCHARDTOUN.

No 54.

A landlord binds his tenants to pay their rents to certain creditors named in their tacks. An appriser of the land found preferable to these creditors.

JOHN MORISON pursues the tenants of the lands of Orchardtoun, for payment of the mails and duties thereof to him, by virtue of his infeftment and comprising of the lands from the heritor, and they, and certain others of the heritor's creditors compearing, and defending with a tack of the lands set by him to the tenants, for payment of the duties therein exprest; which duties, by the said tack, they were obliged to pay to the particular persons specially enumerated in the said tack, who were the said heritor's creditors, for satisfying of the annualrent of their debt yearly, and so much of their principal sum as the said rents, by and attour these annualrents will extend to; in respect whereof, the creditors foresaid *alleging*, That they ought to be preferred in the duties of the said tack to the compriser, seeing the said tack not only precedes the said comprising, and all other diligence done by the compriser, but also is before the debt whereupon he comprised; and this tack must be repute, as if the same had been set to these creditors themselves *per expressum*, seeing it is expressly set for payment of the duties to them *nominatim*.—And the other *answering*, That his comprising and infeftment gives him right to the duties of the tack, he being heritor now and singular successor; and the tack must be esteemed as if the duty thereby had been paid to Orchardtoun himself, *quo casu* he would have been preferred.—THE LORDS repelled this allegiance, and preferred the compriser in the mails and duties of the tack to the creditors, albeit specially named, to whom, by the tack the duties thereof are appointed to be paid; seeing the author of the tack being denuded of his heritable right by the comprising and infeftment, the duty behoved to pertain to the heritor, and could endure no longer to the use of his other creditors, than during the space that the heritable right remained with him who set the tack; but found, That the said tack-duty pertained to the said pursuer's singular successor, by apprising and infeftment.

Clerk, *Scot.*

Fol. Dic. v. 1. p. 181. Durie, p. 780.

No 54.

*** Spottiswood reports the same case :

JOHN MORISON having comprised certain lands from the Laird of Orchardton, pursued the tenants for payment of their mails and duties. *Alleged*, That they were tenants to John Brown of Mollance, who, long before the pursuer's comprising, or the debt which was the ground of it, had tack and assedation set to him by Orchardton of the same lands, whereof there were terms to run ; and that for payment of certain of Orchardton's creditors of their yearly annualrents, and so much of their principal sums as the rents of the lands would extend to, by and attour the annualrents : conform whereunto he hath been in possession divers years of uplifting the mails and duties, and in paying the creditors so far as they did extend to. *Replied*, Not relevant to exclude the pursuer's right, who must be preferred to all the rest of the creditors, although prior, because of his diligence, having comprised and being infest. *Duplied*, His diligence cannot prejudice the tack that was prior to it, which tack set to Mollance in favours of the creditors, is all one as if it had been set to the creditors themselves ; in which case they would have been preferred to the compriser. *Triplied*, The tack is no more in effect than the assignation to the mails and duties, whereunto the assignees can have no more right after the cedent is denuded of the property.—THE LORDS repelled the aliegeance, and preferred the compriser to the other creditors.

Spottiswood, (COMPRISING) p. 54.

No 55.

A woman assigned to her creditor, for his security, the arrears of rent which should be due by her tenants at her death. Having afterwards married, her husband claimed those rents *jure mariti*, which requires no intimation. Found, that being liable for his wife's debt, he could not with effect hold this plea.

1662. January 25. CUNINGHAME against TENANTS of POMONT.

SIR JAMES CUNINGHAME, servitor to the Lord Chancellor, having a bond of the late Duchess of Hamilton's, whereby she bound herself, her heirs and executors, to pay to him a sum at the first term of Whitsunday or Martinmas after her death ; and, for his security, she did assign him to as much of the readiest of her rents pertaining, or that should pertain, to her at her decease, as should pay the samen. The said Sir James did intimate the assignation to her tenants about the time of her death, and called them, and Mr Dalmahoy her husband for his interest for payment. It was *alleged* for John Dalmahoy, That the obligation *incipit ab barede*, and the sum of money payable, not till after her death, and consequently the rents which, the time of, and before her death, did belong to her husband *jure mariti*, and as *dominus bonorum*, cannot be made furthcoming for this debt. It was *answered*, That the obligation *incipit a debitore*, by which she has obliged herself, her heirs, and executors ; and though the term had been 20 years after her death, yet *cedit dies*, it is a debt upon her *a die obligationis* ; and seeing the husband has no right to the wife's moveables or rents, but *cum onere debitorum*, the rents assigned (and which assignation the husband cannot

quarrel, nor any deed lawfully made by the wife when she was *soluta*) ought to be made furthcoming to the pursuer.

No 55.

THE LORDS repelled the allegiance. *In præsentia.*

Fol. Dic. v. 1. p. 181. Gilmour, No 24. p. 19.

1666. February 6. WATSON against FLEMING.

THERE being an infeftment of annualrent granted out of lands and teinds, and an assignation to the teind duties, in so far as extended to the annualrent, the teinds and lands were thereafter appraised from the common author before the annualrenter had obtained possession, by his real right, of the annualrent, but only by his assignation to the teind duties. It was *alleged* by the appriser, That the assignation to the teind duties could give no longer right than the property thereof remained in the cedent's person; which ceasing by the appraising, the assignation ceased therewith, as is ordinarily and unquestionably sustained in assignations to mails and duties of land. It was *answered*, That there was great difference betwixt lands which require infeftment to transmit the same, and teinds which require none, but are conveyable by an assignation; for, if this had been by an assignation to the tack of teinds, *pro tanto*, it would have been unquestionably valid; and therefore being an assignation to the teind duties, it is equivalent as a disposition to lands, which would carry the right of a reversion, though not exprest, and though there were no more to dispo-
pone but the reversion only. It was *answered*, That if the assignation had been to the teinds, that is to the right, or if it had been to the full teind duty in the tack, or of certain lands, then the case might have been dubious; but being not of the teind duties of any particular lands, but out of the first and readiest of the teinds of several lands, it was not *habilis modus*.

No 56.

Assignation out of the first and readiest of the teinds of several lands in security and payment of a debt, was not found good against a posterior appraising of the lands and teinds.

Which the LORDS found relevant.

Fol. Dic. v. 1. p. 181. Stair, v. 1. p. 348.

1732. November. BAILLIE against EARL of MARCH.

No 57.

A PROPRIETOR of an entailed estate having granted to a creditor assignation of mails and duties, the assignation, after the granter's decease, was found effectual against the heir; for, though he did not represent the defunct with respect to the debt in question, contracted contrary to the entail, yet, the entail not being recorded, the debt might be made effectual against the estate by adjudication, and therefore the heir could have no just interest to quarrel the form of the conveyance. *See TAILZIE.*

Fol. Dic. v. 1. p. 181.

No 58. 1734. *January 12.* EARLS of LOWDON and GLASGOW *against* LORD ROSS.

THE LORDS found an adjudication *contra hereditatem jacentem* preferable to an assignation of mails and duties granted by the defunct proprietor, where the competition was about the rents that fell due betwixt the proprietor's death and the date of the adjudication. See SUCCESSION.

Fol. Dic. v. 1. p. 181.

SECT. XI.

Apprisings and Adjudications with Voluntary Rights.

1612. *June 16.* HENDERSON *against* M'ADAM.

No 59.
An heritable bond, before denunciation in a comprising, though the infeftment was posterior to it, was preferred, being before infeftment upon the comprising.

IN an action of poinding of the ground, for an annualrent of L. 20, out of a tenement of land in Edinburgh, disposed by William Cuninghame, heritor, in favours of Samuel Henderson, and his heirs, the Lords fand, that the infeftment granted by William Cuninghame to Samuel, after the denunciation used at the instance of John M'Adam, who thereupon comprised the said tenement, was a good infeftment, in respect the same depended upon a contract preceding the denunciation, whereby William Cuninghame was obliged to infeft Samuel in the said annualrent.

Fol. Dic. v. 1. p. 182. Kerse, MS. fol. 224.

1622. *March 22.* HOPE *against* ANDERSON.

No 60.

FOUND, that a procuratory of resignation may be used after denunciation to be comprised.

Item, found, that diligence done upon the offer of resignation, albeit refused, if thereafter resignation and infeftment follow, that it cannot be prejudged by an intervenient comprising.

Fol. Dic. v. 1. p. 182. Kerse, MS. fol. 226.

1628. *January 30.* HAMILTON *against* BROWN.

MARK HAMILTON having comprised a tenement in Edinburgh, pursued for the mails and duties thereof. N. Brown got a disposition of the same tenement from the heritor the very day of Mark's denunciation of his comprising, and was infeft therein before the comprising. Upon which disposition and infeftment prior to the pursuer's comprising he founded his exception, and had it sustained, the disposition proceeding upon an onerous cause, viz. upon a contract of marriage.

Fol. Dic. v. 1. p. 182. Spottiswood, (COMPRISING) p. 44.

No 61.

A disposition, of the same date with the denunciation, but with the first infeftment, was preferred to the apprising.

1630. *July 3.* COCHRAN *against* HAMILTON.

HAMILTON of Tweedie being debtor by bond to Cochran in 1000 merks, for payment of the annualrent whereof, while the principal sum was paid, he causes William Henry, his tenant, oblige himself in the bond, to pay yearly 100 merks, which the bond bore, *to be done by the said tenant, at the direction of his said master*; likeas, in that same bond, his master allows to him that 100 merks, in the first end of the mails addebted to his master yearly. The tenant being charged by the creditor foresaid to pay the 100 merks for annualrent, he suspended upon double poiding against the creditor on the one part, and against the compriser, viz. the Lord Balmerino, who had comprised the lands from the said Hamilton of Tweedie, and was infeft therein, by virtue whereof the duty of the lands was alleged to belong to him; and the other creditor *alleging*, That the tenant was obliged to him, by his personal bond, to pay that yearly profit to him for the annualrent of his money, while their payment thereof, for so the bond bore; so that whatsoever duty should be evicted from him, as tenant of the land, it should not be derogate to his personal obligation, which had no respect to the land.—THE LORDS found, That this tenant, notwithstanding of the said obligation, whereby he was obliged to pay this annualrent to the creditor, was only subject to pay the said duty of 100 merks acclaimed once, to any of the two parties which might be found to have best right to the duties of the lands possessed by him, and therefore ordained the two parties to dispute which of them should be preferred therein; for it was found that he ought not to pay to both.

No 62.

A tenant binds himself, in a bond with his landlord, to pay to his landlord's creditors a sum annually out of his rent. Another creditor claims the whole rent in virtue of an apprising. Found, that the tenant can be obliged to pay only to the one or the other.

Act. *Lewis.*

Alt. ———.

Clerk, *Gibson.**Durie, p. 524.*

1637. July 11.

ROBERTSON *against* BROWN.

No 64.
Decided in
conformity
with No 59.
p. 2818.

ONE Robertson being infest in a tenement in Perth, in March 1637, by resignation made by James Brown, which James was infest therein upon the 4th of July 1631, conform to a preceding disposition of that land, made to him by Gilbert Brown heritor of the land, dated February 1st 1631, pursues removing against Patrick Brown, who was infest in that same tenement, upon the 5th of July 1631, a day or two after the sasine taken by the said James Brown, the pursuer's author, the defender's sasine depending upon a comprising, deduced against the said Gilbert Brown at his instance; the denunciation of which comprising was in June before the sasine given, and taken by James Brown, upon his right made to him by Gilbert; albeit the comprising and sasine was not perfected, but within a day or two of James Brown's sasine, yet he contended he had sufficient right to bruik the lands, in respect of his foresaid exact diligence done legally, and that he had served inhibition upon the 2d February 1631, against the said Gilbert, whose voluntary disposition, done only one day before his inhibition, ought to prejudge the defender; seeing the said Gilbert Brown, common author, and James Brown receiver of the disposition, were, and are, both bankrupts, the disponent still continuing in possession, and there being nothing to qualify any real debt, owing to him by the said James Brown: so that he *alleged*, that his sasine upon his comprising, albeit a day or two only expedite after the said James his sasine, ought to be drawn back to the time of his denunciation, and ought to defend him in his possessory judgment, seeing he offered to prove, that the common author retained possession of the land, notwithstanding of the disposition made by him, continually while the excipient removed him by order of law, viz. in October 1632, at which time the excipient became in possession, wherein he was continued ever since unto the time of this plea. And the pursuer *replying*, that his right ought to be preferred in respect of his sasine, preceding this defender's sasine; which prior sasine of his depends upon a disposition preceding the excipient's denunciation; and albeit both receiver and disponent were bankrupts, yet that ought not to prejudge this pursuer, who for most onerous causes had acquired the right, and knows nothing of what proceeded betwixt his said authors. THE LORDS repelled the exception, and preferred the pursuer, in respect of his author's first sasine and first disposition, and found the denunciation of the comprising, was no impediment to the acquirers of the disposition, to take a sasine conform to the said disposition which preceded the denunciation, and also the inhibition, or even after the said denunciation, the same depending upon a preceding cause; neither respected the LORDS that both the disponent and acquirer were bankrupts, seeing this pursuer who had acquired this right, albeit lately, yet the same was for an onerous cause, and he was never qualified, nor alleged to be partaker of any fraud with his authors; and the possession was not respected, seeing it was but a possession of five years, which is not receivable to maintain any right in itself, nor suffi-

cient against the pursuer's right, wherefore the pursuer was preferred, as said is. See BANKRUPT.

No 64.

Act. Hepburn.

Alt. Oliphant.

Clerk, Hay.

Fol. Dic. v. 1. p. 182. Durie, p. 850.

1673. February 6. BROWN of Colstoun against NICOLAS.

No 65.

An infeftment of annualrent being after the first apprising but before the second, all three were brought in *pari passu*, being within year and day, the statute 1661 being new and dubious.

THE lands of Thorntoun, Loch, and others, being appraised, first by Young and thereafter by Nicolas, and several other appraisers, within year and day, from the Laird of Dunglass, who did also grant an infeftment of annualrent to Brown of Colstoun, and he was infeft after the first appraising, and before all the rest, and his annualrent clad with possession within the year; the Lord Gosford having bought the lands from Dunglass, raiseth a double poinding against the appraisers and annualrenter, all being redeemable, that they might dispute their right and preference to the price of the lands. There was no debate amongst the appraisers, who had appraised within year and day of Young's appraising, which was the first effectual appraising. But it was *alleged* for Colstoun the annualrenter, That he ought to be preferred to all the appraisers, except Young, because his annualrent was constitute by infeftment, and clad with possession before the date of their appraisings. It was *answered* for the appraisers, That by the act of Parliament 1661, anent Debtor and Creditor, it is statute, That all appraisings since January 1652, that are led within year and day of the first effectual comprising, shall come in therewith *pari passu*, as if one appraising had been led for all; by which statute these posterior appraisers being within a year, are *fictione juris* drawn back to the date of the first appraising, as if they had been comprehended in it, or led the same days with it, in which case all of them would have been anterior and preferable to this annualrent. It was *answered* for the annualrenter, That the meaning of the statute can only be in the case where there is no competition, but of appraisings amongst themselves, which will come in *pari passu nisi sit medium impedimentum*; but here there is a mid impediment, viz. this infeftment of annualrent; and it cannot be supposed that the first appraising should disable the debtor to secure his creditors, or dispose of any part of the lands appraised for year and day, which would be the necessary consequence, if all appraisings within the year were drawn back to the first, and would be of great inconvenience. It was *replied* for the appraisers, That this statute being so clear and express, that all appraisers within the year, shall be as if the first appraising were led for all, there is no warrant for any limitation; but on the contrary, the special intent exprest in the act, being, that creditors be not frustrate, but may have a time to appraise for their security, it would be altogether evacuate, if the debtor might dispose of the lands appraised, or burden the same; for then upon pretence of that mid

No 64.

pediment, all the posterior apprisings would be hindered to come in with the first, or which were more inconsistent, the posterior apprisings would come in with the first, and take off the far greatest part of the effect of it, and yet an intervening annualrenter being preferred to the posterior apprisers, might carry all from them which they carried from the first apprising, and so the annualrent, though long posterior to the first apprising, would even be preferred in a great part to the first apprising itself; as if the price of the lands appraised were 4000 merks, and the first apprising were for 4000 merks, and two posterior apprisings, each for 6000 merks, these three coming in *pari passu*, making in all 16000 merks, the first apprising being but for four, would have only a fourth part of the price, which is 1000 merks, and the other two posterior apprisings would carry 3000 merks; now suppose there were an infeftment of annualrent for security of 3000 merks after the first apprising, and before the two posterior apprisings, if it were preferred to them, it would carry the whole 3000 merks from them, so they should have nothing, but the annualrenter should be preferred to the first appriser long anterior to it as to three quarters of the sum, which were most absurd; but it is clear by the statute, that the first apprising, and the charge, or infeftment thereon, is communicate to the posterior apprisers, so that the first appriser cannot cancel or renounce the same; and though it were satisfied, it will stand good for an infeftment or charge to the posterior apprisers within the year, who need no other infeftment or charge to exclude any other right; neither is there any inconsistency that the debtor should be stopped from granting voluntary deeds for a year, nor any thing of such inconvenience, as if he might frustrate the statute, and elude all posterior apprisers. It was *duplied* for the annualrenter, That this statute being new and doubtful, never cleared by any determination as to that point, he having secured himself by an infeftment of annualrent, ought not to be totally excluded, but as he had a bond containing a precept of sasine before the first apprising, and shortly thereafter having taken sasine clad with possession, as he might have appraised at that time, so at least his infeftment must stand valid as if it were an apprising to bring him in *pari passu* with the apprisings, which hath no inconvenience, but is much cheaper than the apprising, especially seeing the statute hath an exception not only of the apprisings led upon annualrents, but of the annualrents themselves.

THE LORDS found that this intervening annualrent could not hinder the posterior apprisings to come in with the first; but that the annualrent should bring in the sum whereupon it was granted, as if an apprising had been led thereupon; the statute being new and dubious.

Fol. Dic. v. 1. p. 182. Stair, v. 2. p. 166.

1676. February 9. SIR PATRICK NISBET *against* HAMILTON.

AFTER the lands of a debtor were denounced to be comprised; a voluntary right was granted by him, of an annualrent out of the same lands for an onerous cause; whereupon the annualrenter was infeft by a public infeftment, before any infeftment upon the comprising; and there being upon the foresaid rights a competition betwixt the compriser and the annualrenter: It was *alleged*, That after the lands were denounced, the debtor could not give a voluntary right of the same, being litigious, and affected with the denunciation: And on the other part, it was *debated*, that the debtor, not being inhibit, might give a voluntary right for an onerous cause, and the first consummate right ought to be preferred.

THE LORDS, in respect it was pretended there were contrary decisions, thought fit, not to give answer, until these should be considered.

Fol. Dic. v. 1. p. 182. Dirleton, No 328. p. 157.

No 65.
Competition between a comprising denounced, and a posterior voluntary right followed by infeftment, before the compriser was infeft. Not decided.

1682. December. JUSTICE *against* AIKENHEAD.

LUDOVICK KEIR having granted a wadset of the lands of Easter Crichton to Dr Scot, for the sum of 12,000 merks, and Dr Scot having disposed the wadset to Hepburn of Seaton, he thereafter disposes the same to John Justice, late Bailie of Edinburgh; and there being an apprising led at the instance of Janet Aikenhead, relict of Adam Nisbet writer in Edinburgh, against Dr Scot, of the foresaid wadset, and certain tenements of land in Edinburgh belonging to him; and John Justice having likewise apprised Dr Scot's right, pursues a declarator against the said Janet Aikenhead, for declaring her apprising to be satisfied by her intromissions with the rents of certain tenements of lands in Edinburgh, and that she ought to compt and reckon for that effect.—*Alleged* for the defender, That she could not be comptable for the rents of the tenements of land in Edinburgh, unless Bailie Justice compt to her for the rents of the lands of Easter Crichton, whereof he was in possession.—And it being *answered*, That Bailie Justice was not in possession by virtue of the apprising against Dr Scot, but by virtue of the disposition from him to the wadset, which was prior to the defender's apprising, and the infeftment was prior to the infeftment upon the apprising;—THE LORDS, upon that ground, having preferred the voluntary right and disposition, it was thereafter *alleged* for Aikenhead, That albeit the disposition was prior to the infeftment upon her apprising, yet seeing there was a charge given to the superior upon her apprising, prior to the infeftment upon the disposition made by Dr Scot, and a charge against the superior, being in law equivalent to an infeftment, she ought to be preferred; and albeit the pursuer were preferred by virtue of his right of wadset, yet seeing it was an improper

No 66.
In a competition betwixt an apprising and a voluntary disposition, the Lords, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, although posterior to the charge upon the comprising, in regard the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights.

No 66.

wadset, affected with a back-tack, and he being in the natural possession, was only preferable as to the back-tack duties, but must be comptable for the surplus.—*Answered*, That albeit in a competition betwixt two apprisers, and a charge against the superior, prior to the infeftment upon another apprising, the comprising with the first charge will be preferred ; the infeftment granted by the superior to a second appriser is only looked upon in law to be but a voluntary gratification, which prejudices the other appriser's diligence, by virtue of the charge ; and the reason is, because seeing apprisers may charge a superior, it is just that he that gives the first charge should be preferred ; but that does not hold in the case of a competition betwixt an appriser who has charged the superior, and a party having right by a voluntary disposition, upon which infeftment has followed ; who, albeit the infeftment be posterior to the charge, yet it is always perferable ; because in that case the first infeftment is considered, and not the charge ; and the reason is, because a party having right by voluntary disposition, cannot use diligence against the superior to force him to infeft him ; whereas the compriser may go on in diligence, and force the superior to grant infeftment ; and the superior was not liable to compt for the superplus, more than the back-tack duties of the wadset disposed to him by Dr Scot ; because he had right to the reversion, by an apprising led against Ludovick Keir, granter of the wadset.—THE LORDS preferred Bailie Justice, in respect his disposition was prior to the denunciation of the apprising, albeit his infeftment was after the charge given to the superior upon the apprising ; and found, that the charge was only to be considered in case of a competition of diligence among the comprisers themselves ; but not in the case of the competition of voluntary rights.

Fol. Dic. v. 1. p. 182. Sir P. Home, MS. v. 1. No 297. p. 439.

. President Falconer reports the same case :

IN the competition betwixt Janet Aikenhead, relict of Adam Nisbet, pretending right to the lands of Easter Crichton, by virtue of a comprising led against the common debtor, which was within year and day to a comprising, in Bailie Justice his person, whereupon the superior was charged ; and Bailie Justice pretending right to the said lands, by virtue of a disposition granted by the common debtor, before denouncing of the lands to be appraised, and confirmed by the superior, after a charge upon the comprising against the same superior ;—it was *alleged* by the compriser, That the charge against the superior was equivalent to an infeftment, and consequently, being prior to the confirmation, was preferable.—It being *answered*, That a charge against a superior upon a comprising, albeit it was equivalent to an infeftment in the competition of diligence betwixt comprisers or adjudgers amongst themselves, and did so bind up the superior, that he could do no deed to prefer one to another ; yet it was not equi-

valent to an infeftment in the competition with a voluntary right, such as this is, especially the disposition, which is the ground of the voluntary right, being before the denunciation of the apprising; and the nature of voluntary rights being such as cannot be completed by diligence without a superior's consent, the superior at any time may confirm them, even after a charge upon a comprising, and that, if it were otherwise, it would tend to unhinge a purchaser's securities, there being no record of charges upon comprising against superiors.

—THE LORDS, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, albeit posterior to the charge upon the comprising, in regard they found, That the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights.

Fol. Dic. v. 1. p. 182. Pres. Falconer, No 58. p. 38.

1707. July 15.

MR JOHN STEUART of Blackhill, *against* The ADJUDGERS of the Estate of Corshill.

IN the competition betwixt the Adjudgers of the estate of Corshill and Mr John Steuart of Blackhill, who craved preference upon a disposition of relief granted to him by Corshill, clothed with infeftment before the leading of their adjudications; it was *alleged* for the Adjudgers, That the disposition of relief could be no ground of preference; because it bears this clause, ' That the granting thereof shall be nowise prejudicial to any former right granted by Corshill to his lawful creditors, of their just and true debts owing by him to them; whereby their anterior debts, though only personal were salved; because, 1^{mo}, The exception is of any former right of their just and true debts owing by him to them, and not for their just and true debts; and the word *of* made the clause respect personal bonds, whereas the word *for* would more properly have related to real securities; 2^{do}, The clause had been useless, had it reserved only prior real rights; for these could not be prejudicial thereby, and so needed not to be reserved; and *verba debent aliquid operari*; 3^{tio}, Blackhill has looked upon that clause to be a reservation in favours of all the prior creditors, or else he would never have been at the trouble and expence to lead so many adjudications as he has done, for the very debts contained in the disposition; 4^{to}, The words are to be interpreted *contra proferentem*, i. e. the party who ought to have cleared the meaning of them, and that is Blackhill; the clause being ingrossed in favours of creditors in a right granted to Blackhill, who may blame himself that real were not distinguished from personal creditors.

No 67.

In a competition betwixt adjudgers and a disponee in relief, infeft; the disponee found preferable to personal creditors, whose adjudications were posterior, notwithstanding of a reserving clause in his disposition, in favour of prior creditors.

No 67.

Answered for Blackhall ; The clause can only operate in favours of anterior real creditors ; for, *1mo*, The distinction betwixt *of* and *for*, which in that clause would signify one and the same thing. is frivolous ; *2do*, Though the words be not extended to personal creditors, they will operate very much ; for there might have been many objections against the former voluntary real securities ; yea, if they be extended to personal creditors, the disposition to Blackhall was to no purpose ; seeing Corshill, at the granting thereof, had more debt than his estate was worth. It were absurd, that under the notion of *verba debent aliquid operari*, we should make them *operari quidlibet*, and that which overthrows the very design of the disposition ; *3tio*, The accumulating securities *ex superabundante non nocet* ; and besides, Blackhall had good reason to adjudge notwithstanding his infestment of relief, that thereby he might have a more direct security, which at length might become a sovereign irredeemable right ; *4to*, Any thing the creditors can draw from a contract where they were not parties, is rather strictly to be interpreted, considering that voluntary grants in favours of others, are not to be drawn too much in prejudice of the granters ; *5to*, It cannot be thought that by the foresaid clause, personal creditors were meant ; because the design of the disposition and infestment of relief, was to give Blackhall real security, beyond the personal security of relief that formerly he had, and consequently to put him in a better condition than other personal creditors ; for the clause aforesaid was of the nature of an exception, the same upon the matter, as if it had been worded thus, ‘ Excepting from this disposition any former right granted by Corshill to his creditors, of their just and true debts.’ Now, by the rule of interpretation, *exceptio* must be *de regula* ; consequently this exception in a disposition for real security, must necessarily be understood of real rights ; *6to*, The clause cannot operate in favours of personal creditors ; for, had these never adjudged, they could not by virtue thereof effectually disappoint a process of mails and duties at Blackhall’s instance, founded upon his real right of relief ; nor can it be any more effectual to them, now that they have adjudged ; because the meaning of the provision was to secure the former rights of creditors in the state they then were, and not to fortify adjudications that then were not, and possibly would never exist ; *7to*, To show that by the disposition to Blackhall, a preference to personal creditors was designed, by another clause therein it is provided, That after his own payment by intromission, he should be comptable for the superplus intromission to Corshill’s other creditors ; which argues plainly, that Blackhall was to be first paid, and that these other creditors were the personal creditors ; the real creditors being salved by the other clause preferring them to Blackhall himself.

Replied ; To interpret the clause in Blackhall’s sense, would make it altogether elusory ; for the interest of prior real creditors would have been entire however ; seeing, if their infestments were valid, they were certainly secure ; and though there had been nullities therein, they would have proved such diligences as might be a ground to reduce the posterior voluntary right in favours

of Blackhall, upon the act of Parliament 1621; therefore the uselessness of the clause, if not extended to personal creditors, is a greater argument it should be extended to them, than it is to say, That the disposition to Blackhall would be to no purpose, if the clause were to be extended to personal creditors; for the disposition being his own evident, he who is *in lucro captando*, and took it with a reservation in favours of creditors, ought not to be allowed to explain that reservation, so as they who are *in damno vitando* shall have no advantage by it; 2do, As to the clause whereby Blackhall, after relieving of himself, was to hold compt to the other creditors for the superplus rent, conform to his intromissions; that was upon supposition that he did intromit, and that the rents were sufficient to both; in which case, being only liable for actual intromissions, he might retain for his own satisfaction in the first place, and leave the rest to the other creditors. But that event of his intromission did not exist.

THE LORDS found, That the disposition by Corshill in favours of Blackhall, operates in his favour a preference to the personal creditors, who had not secured themselves by anterior preferable diligence.

Forbes, p. 182.

1709. February 8.

COLONEL JOHN ERSKINE of Carnock *against* SIR GEORGE HAMILTON.

IN the competition betwixt Colonel John Erskine, and Sir George Hamilton, (mentioned *supra*, December 18. 1708, *voce* CITATION, No 88. p. 2225.) for the right of the lands of Tulliallan, the Colonel founded on an apprising led at the instance of Duncan Lindsay, against Sir John Blackadder the heritor, and an infeftment thereon under the Great Seal, *anno* 1633, conveyed by Duncan Lindsay's heir to the Earl of Kincardine, the Colonel's author, in the year 1676, who, upon the heir's resignation, obtained that same year a charter under the Great Seal. Sir George Hamilton produced an apprising led by Patrick Wood in *anno* 1637, on a contract of salt, betwixt Sir John Blackadder, Patrick Wood, James Loch, and other six merchants, who, for the price thereof, were all infeft in March 1634, and assigned their rights, with some other debts, in trust to Patrick Wood, that he might lead an apprising for their respective behoof; to James Loch's eighth share of which apprising, Sir George Hamilton derives right from Sir Robert Miln, to whom James Loch disposed it.

Sir George Hamilton pleaded his preference to Colonel Erskine thus, Duncan Lindsay disposed his apprising in the year 1634 to Patrick Wood, who had a partial right to the reversion; which disposition, containing procuratory of resignation, and precept of sasine, being registered in the register of reversions, was, 14th January 1704, found to have the effect of a redemption and renunciation of the apprising, for securing Wood the reverser's right, against all poste-

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A party had conveyed an apprising to one person, and his heir afterwards conveyed it to another. The first having been recorded in the registers of sasines and reversions, the second was null.

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rior rights of the lands disposed, granted by, or otherways derived from, Lindsay the disponer; so that the posterior disposition by Duncan Lindsay's heir, in favours of the Earl of Kincardine, was wholly null as to all intents and purposes, not only in so far as the same might prejudice Patrick Wood or his heirs, but also in competition with Sir George Hamilton, or any other person having a separate interest in the lands which are the subject of the competition. Because, after redemption made by Patrick Wood the reverser, nothing remained with Duncan Lindsay the appriser, that he or his heirs could transmit to any other; for of all real rights, apprisings within the legal are most easily extinguished, viz. by intromission with the rents of the subject, or payment of the debt instructed by simple discharges, &c. without necessity of formal resignation or renunciation in favours of the reverser; and *bona fides non patitur ut idem bis exigatur*.

Answered for Colonel Erskine, 1st, Patrick Wood had no right to the reversion *anno* 1634, when he took and registered his disposition, (being only a creditor to Blackadder the reverser by an infeftment for security), and could not use any order of redemption till the year 1637, when he came in Blackadder's place, by apprising the reversion; for, to allow the right of redeeming to creditors before they affect the reversion, ~~were to~~ make all second apprisings needless, seeing nothing but the reversion is carried by the second apprising. But *esto*, Patrick Wood had been the reverser, when a person having right to the legal reversion redeems or pays, the first right is not diminished or made worse, but conveyed to him *tanquam cuilibet*, and becomes irredeemable in his person. For, otherwise, creditors should be in a worse case than apparent heirs are by the act of Parliament 1661, in whose favours the legal reversion expires in ten years, which is absurd. And, by the act 22. Parl. 1. sess. 3. Ch. II. second apprisers redeeming and taking rights to first apprisings, are noways prejudiced of their right to the first apprising; but, on the contrary, it hath further privileges in their person, than it would have had while it continued with the first appriser. Now, can it be imagined that Patrick Wood, by taking a conveyance to himself, intended to cut off the legal in favours of the debtor, or other creditors he was noways obliged to? Which is not only against the maxim, *res inter alios acta aliis non prodest*, but would cast loose most of the purchases in Scotland, made up by persons, who, having partial or less preferable rights, bought in the rights of preferable creditors. 2do, The disposition in favours of Wood never having been completed by infeftment, did not denude Duncan Lindsay, who stood infeft upon his apprising; and therefore his heir might validly transmit the same to the Earl of Kincardine, or any other, 1676, Brown *contra* Smith, *infra*, b. t. And my Lord Stair observes, lib. 3. tit. 1. §. 21. That though backbonds, assignations, or even discharges, granted by apprisers within the legal, might be good against their singular successors by infeftment, if such deeds be rendered litigious within the legal; yet, after expiring of the legal, infeftments upon apprisings are in the same case as infeftments upon irredeemable disposi-

tions. *3^{to}*, If the disposition to Wood could operate a redemption, it could only be effecting to his proportion and interest to redeem, which was but in security of an eighth part of the sums in his apprising. As a wife's registered renunciation of her liferent infeftment, in favours of a posterior wadsetter or annualrenter, would only secure the wadsetter or annualrenter against singular successors deriving right from the wife; but after such a wadsetter or annualrenter is paid, the husband's heir, or his other creditors, could not debar the wife or her assignee from possessing. And one of three cautioners taking assignation to the debt, and before intimation thereof to the principal debtor, or other cautioners, another completing a right to it by an intimated assignation, or decret of furthcoming upon arrestment, the LORDS would save the cautioner *quoad* his own part wherein he was debtor, as to which the assignation had the effect of a discharge, but would prefer the arrester or second assignee for the other two cautioners shares. And the registration of the disposition in favours of Wood, was only for publication, in so far as the disposition was virtually an extinction and renunciation for securing Wood's right. *4^{to}*, Patrick Wood might, notwithstanding the registration, have past a charter, and been infeft upon the disposition; and, whatever the disposition could operate in his favours, it must have the same effect to prefer Colonel Erskine, who, by progress, derives right from Patrick Wood, who disposed what right he had to the Earl of Kincardine. Seeing the shortest way for Patrick, who never was infeft, to transfer Duncan Lindsay's disposition, was either to get another right from Lindsay or his heirs, in favours of the person to whom he disposed his own, to save the pains of infefting himself, that he might be qualified to dispoise, or to subscribe consentor to Lindsay's disposition. And so it is, that Colonel Erskine has Wood's personal right by the disposition, and Lindsay's real right by infeftment conveyed to him, and thereby as good right to Lindsay's apprising, as if he had never disposed to Wood, but only to him, or as if Wood had been infeft on the disposition, and denuded in his favours.

Replied for Sir George Hamilton, *1^{mo}*, The infeftment granted by Sir John Blackadder *anno* 1634, to Patrick Wood, and the other copartners, did include an assignation to any right of reversion competent to Sir John. The 22^d act of the 3^d sess. of K. Charles the second's first Parliament is not applicable to this case; for there is a great difference betwixt an appriser acquiring right to a prior apprising within the legal, and one having right to the reversion by the disposition. Two apprisings unexpired might very well consist in one person, and the creditor take the benefit upon the legal's expiring before the common debtor redeem; but where one having right to the reversion, by disposition and infeftment, acquires an apprising within the legal, the apprising is absorbed in his right of property, and could no more subsist in his person as a distinct Sovereign right, than it could have subsisted in Sir John Blackadder's person, had he acquired the apprising before he was denuded by the disposition and infeftment in favours of Wood and his copartners, during the standing of whose right (though.

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Duplied for Colonel Erskine; In the year 1634, when Patrick Wood got the disposition from Lindsay, there was no further tie betwixt him and the other creditors in the salt-contract, save only, that their securities were in the same paper, which inferred no communication of right, but only saved the pains of writing the contract, and what followed upon it, eight times over; for, *quot sunt personæ, tot sunt obligationes*.

THE LORDS found, that Duncan Lindsay's apprising being conveyed in favours of Patrick Wood, and registered in the register of sasines and reversions, any subsequent disposition by Lindsay the appriser, or his heirs, in favours of the Earl of Kincardine, or his authors, was null as to all effects; but found, that

Patrick Wood could lawfully dispoſe the appriſing to the Earl of Kincardine, or his authors, to ſubſiſt as a ſecurity for the ſums truly paid.

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Forbes, p. 318.

1724. February 26.

MR. WALTER STIRLING, &c. *againſt* The ANNUALRENTERS upon the Eſtate of Ballagan.

No 69:

In a competi-
tion with an
infeſtment of
annualrent,
found that a
charge upon a
comproſing
gave no pre-
ference.

In the ranking of the creditors of Ballagan, a competition aroſe betwixt the annualrenters and adjudgers; whereof the caſe was, that the heritable bonds and writs in favours of the annualrenters, were prior to any ſtep of diligence upon the adjudications; but the infeſtments thereupon were poſterior to the adjudications and charge againſt the ſuperior; and the adjudgers were never infeſt.

For the adjudgers it was *pleaded*, That by act 62, 1661, confirmed by conſtant cuſtom, an adjudication with a charge is equal to adjudication with infeſtment, which muſt prefer it to all poſterior infeſtments. And there is good ground it ſhould be ſo; for, if a charge againſt the ſuperior is the laſt ſtep the law directs to be taken during the legal, ſuperseding the neceſſity of infeſtment till after expiration thereof, the charge ought to be conſidered as an abſolute ſecurity during that time; otherwiſe every adjudger would be under a neceſſity of taking immediate infeſtment, to his own great inconvenience, and the utter ruin of the debtor.

It was *answered*, That theſe charges againſt the ſuperior tend only to regulate the competitions of adjudications one with another, but were never deſigned to give a preference in competition with voluntary rights; as was expreſſly found, Juſtice againſt Aikenhead, No 66. p. 2823. For an adjudication with a charge, is not ſo much as a real right to require a ſpecial ſervice; how can it then compete with an infeſtment?

THE LORDS found, That the heritable bonds and writs in favours of the annualrenters and infeſters, being prior to the adjudications; the infeſtments on the rights of annualrent, though poſterior to the adjudication and charge thereon, are preferable to the ſaid adjudications.

It was likewiſe *pleaded* in favours of the annualrenters, That the charge againſt the ſuperior, at the adjudger's inſtance, was executed againſt an apparent heir not infeſt, who could grant no infeſtment; and conſequently the charge was null. But the Lords took it up upon the abſtract point, and determined accordingly.

Fol. Dic. v. 1. p. 182. Rem. Dec. No 48. p. 95.

1728. *July.**MAIR against BALLANTINE.*

No 70.

In a competition betwixt an apprising and a voluntary disposition, the LORDS in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, although posterior to the charge upon the comprising, in regard the charge was only to be considered in competitions of diligences among themselves, but not with voluntary rights. *See APPENDIX.*

*Fol. Dic. v. 1. p. 182.*1749. *December 5.**BINNINGS against The CREDITORS of Auchinbreck.*

No 71.

An adjudication not followed forth, cannot compete with a posterior voluntary infeftment.

CHARLES MAITLAND of Hatton, afterwards Earl of Lauderdale, by several deeds settled upon his son Alexander 25,000 merks, payable at his death; and having deceased, Alexander obtained a decret of cognition, against Earl Richard his son, who renounced to be heir; and thereupon led an adjudication 1694 for his principal sum, with interest, from a blank term; and, after Richard's death, transacted his claim with Earl John his brother and successor, for 20,000 merks, with interest from Whi sunday 1697.

Another creditor had adjudged 1694, and was infeft 1695; and Sir William Binning of Wallyford adjudged also 1694, upon which he raised a process of mails and duties 1696, wherein there is a minute 1699, but there was no further procedure.

Earl John granted an heritable bond 1706, out of the lands of Glassery, to Sir Robert Blackwood of Pitreavie. whereon he was infeft, and conveyed it to Sir James Campbell of Auchinbreck, who had purchased these lands from the Earl of Lauderdale, and also bought in Mr Alexander Maitland's adjudication extending over them.

In the ranking of Auchinbreck's Creditors, Mr William Binning of Wallyford, and Jean Binning, as representing Sir William, claimed the lands of Glassery, in virtue of his adjudication; and *objected* to Mr Alexander Maitland's adjudication, That the sums for which it was led, fell only due on the death of Earl Charles, of which there was no proof in the decret of constitution; and this was the more fatal, as the interest was adjudged for, which ran from his death, the time whereof did not appear: It might be hard totally to annul a diligence, on account of inaccuracy, in a question with the debtor; but here was a competition of diligences, in determining whose preference greater exactness ought to be observed.

Answered, It was notorious Earl Charles was dead, and his heir appeared and renounced; after which, there needed no further proof. And the adjudication being led for the principal, with interest from a blank term, was equal as if no

interest had been libelled at all, and could only be a security for the interest running from its date : And the adjudger having after transacted for 20,000 merks, which is within the 25,000 merks adjudged for, is sufficiently secured.

Objected to the heritable bond ; Wallyford having adjudged within year and day of the first effectual adjudication, is entitled to be ranked with it ; and, in consequence of the infeftment upon it, to exclude the posterior heritable bond : At least, the heritable bond being granted after the estate was made litigious by his adjudication, cannot compete with it ; unless it could be said he was *in mora* in following it forth, which he was not, being not obliged to further diligence, as he was entitled to the benefit of his co-adjudgers infeftment, whereby his right was completed ; and he also insisted in an action of mails and duties.

Answered, The act bringing in co-adjudgers *pari passu*, does not regulate their preference with other rights, and here Wallyford was *in mora*.

THE LORDS found, That the adjudication led by Mr Alexander Maitland behaved to subsist for the restricted sum of 20,000 merks and interest, in terms of the agreement betwixt the Earl of Lauderdale and the said Mr Alexander : And found, that notwithstanding of Wallyford's adjudication being within year and day of the first effectual adjudication, and his having raised a process of mails and duties in the 1696 ; yet, as he suffered the same to ly over from the 1699, to the 1706, the date of Sir Robert Blackwood's infeftment, and for several years thereafter, the said adjudication could not compete with Sir Robert Blackwood's infeftment, nor could interpel the proprietor from granting a voluntary infeftment on his estate.

Reporter, *Kilkerran*.

Act. *Ch. Binning*.

Alt. *T. Hay*.

Clerk, *Kirkpatrick*.

D. Falconer, v. 2. p. 120.

1764. July 26.

The DUTCHESS of DOUGLAS against WALTER SCOT Merchant in Leith.

ON the 27th February 1747, Henry Ogle obtained against Lord Cranston an adjudication of his Lordship's lands of Crailing, holding of the Crown, and of the lands of Wauchope, holding of the late Duke of Douglas.

Ogle raised a horning on the 11th of April thereafter, which he executed against the Duke on the 21st of the same month ; and having assigned his debt and diligence to Richard Grieve, a process of mails and duties was brought by him in August, in which an interlocutor was pronounced in December following.

The Duke of Douglas adjudged the above lands on the 21st of July that same year ; but took no other step.

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A creditor by heritable bond preferred to a prior creditor by adjudication who was *in mora*.

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On the 29th May 1750, Lord Cranston granted an heritable bond to Walter Scot on the lands of Wauchope, upon which he was infeft on the 8th June thereafter.

In 1753, another creditor having insisted in a ranking and sale of the lands of Wauchope, a competition ensued between the Dutchess of Douglas, who had right to the Duke's adjudication, by disposition from his Grace, and Mr Scot.

THE LORD ORDINARY having preferred the Dutchess, Mr Scot reclaimed; and, as the case seemed to be of great importance in point of precedent, the Court ordered it to be heard in presence.

Pleaded for Mr Scot: All questions as to land-rights must be decided upon feudal principles, *nulla sasina, nulla terra*. The original infeftment constitutes the first real right, which vests the property: The renewal of that in the person of the heir, purchaser, or creditor, transfers it; for the proprietor cannot be divested, but in so far as another person is vested; consequently, in all such competitions, the first complete feudal right gives the preference; so that the second disponent, with the first infeftment, is preferable to the first disponent with the second infeftment, however culpable the common author may be. The same principle must also hold in competitions between adjudgers who are disponents by act of the law, and disponents by act of the debtor; and, upon that principle, the security of the records depends.

That an adjudication, even with a charge, does not divest the debtor, is incontestible; it does not make the adjudger vassal, but the casualties of superiority continue to fall as before; Dirl. tit. COMPRISING; Stair, lib. 2. tit. 3. § 30. It does not afford a title to pursue a removing, or other real action; 25th March 1626, Lockhart:* It does not exclude the terce or courtesy, nor, *e contra*, does it entitle the wife or husband of the adjudger to a terce or courtesy of the lands adjudged; Stair, lib. 2. tit. 6. § 17. It does not require a special service: In short, till infeftment follows, it is but a personal incomplete right; and such being the situation of the Duke's adjudication, Mr Scot ought to be preferred on account of his having acquired the first complete real right.

Answered for the Dutchess: She is preferable, *first*, because it is an established principle, that legal diligence cannot be disappointed by voluntary deeds of the debtor; were it otherwise, all legal diligence might be disappointed, as voluntary alienations are much sooner executed than attachment by process at law. Hence, a creditor, who proceeds to affect his debtor's subjects by a process of adjudication, or using an arrestment, cannot be hurt by any deed of the debtor's; and it required the force of a statute to limit the effect of the litigiousity occasioned by the diligence last mentioned to five years. Upon the same principle does inhibition restrain the debtor; and the only difference between it and the other diligences is, that, in it, the prohibition to alienate is expressed, in them, it is only implied, which is perhaps the reason why the litigiousity created by it lasts longer.

* See REMOVING.

This principle received the sanction of statute-law, by the act 1621, cap. 18. which, *inter alia*, provides against bankrupts making 'any voluntary payment or right to any person in fraud of the lawful, and more timely diligence of another creditor, having served inhibition, or used horning, arrestment, compassing, or other lawful means, duly to affect the dyvour's lands,' &c. And, by the act 1672, which introduced adjudications in place of apprisings, it is declared, 'That the adjudger shall be in the same situation after citation in this process of adjudication, as if apprising were led of the lands at the time, and a charge given to the superior thereon;' which the Dutchess, as she has a decree of adjudication, mentions, only to show the length statute-law has carried this matter of litigiosity. But there is a material difference between the litigiosity created by a decree of adjudication, and that created by the citation only, or by the other diligences enumerated in the act; because these do not appear in any record; that does from the register of abbreviates; which affords a good answer to Mr Scot's argument from the alleged danger to the security of the records, in case he should not be preferred.

The Dutchess does not pretend, that the effect of litigiosity, even upon record, will debar one who had contracted with the debtor before the process of adjudication from using the right that was in him *ab ante*, and completing it by executing a procuratory or precept without any act or deed of the debtor, which alone the process of adjudication prevents; though it appears, from prior cases in this Section, that this was once very much doubted, and not settled but by a series of decisions. In this, therefore, as well as in the necessity of recording, a decree of adjudication resembles an inhibition, which does hinder the debtor from making a prior personal debt real, by granting a warrant for infeftment after the inhibition; but does not hinder the creditor from taking infeftment on a warrant granted before it.

Though, in ordinary processes intended to constitute a debt, or declare a right to lay a foundation for diligence, litigiosity ends on pronouncing decree, after which there is no longer a *lis pendens*; yet that will not hold in a process of adjudication, which is itself a diligence of the strongest kind, but to complete which there is wanting an infeftment or charge; and, till one of these follows, the litigiosity must continue as the creditor is only *in cursu diligentie*; Stair, lib. 3. tit. 2. § 20.

A decree of adjudication then renders the subject so litigious, that though the creditor proceed no further, yet the debtor cannot disappoint it by any deed, at least within a competent time, as Stair speaks, which is allowed to the creditor for completing it by an infeftment or charge; so that the question is, What time the law has allotted for the duration of the litigiosity and *cursus diligentie*?

This is an arbitrary question, and no precise time has been fixed. It appears *voce* LITIGIOUS, (*Mora*), that the shortest prescription ever sustained was that of six years, in the case observed by Spottiswood in 1627;* but, in the lat.

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ter cases, the *mora* was of ten, twelve, and seventeen years; so that, to postpone the Dutchess because of a *mora* for two years and ten months, would be too great a stretch, especially as the act 1621 annuls all voluntary rights, without any limitation: If a general rule were to be fixed, the period pitched upon in the old decision, or that in the statute concerning arrestments, might perhaps be proper; but to decide that the litigiosity on the Dutchess's adjudication expired in less than three years, would leave the question as dubious as ever; and here it must be observed, that the *mora* is not to be computed from the date of the adjudication to its production in the ranking, but from the date of the adjudication to the granting the voluntary right; for, if the litigiosity then continued, that right was void, and could not convalesce *tractu temporis*.

2dly, The Dutchess's adjudication is within year and day of the first adjudication, rendered effectual by a charge, and therefore preferable, as if it had been the first effectual one. Before the act 1661, a charge on a comprising gave it a preference to other comprising. And, by the words of that act, 'First exact diligence for obtaining the same,' a charge has been universally understood, and held to be exact diligence, without the necessity of entering into a process with the superior; Stair, lib. 2. tit. 4. § 32. and lib. 4. tit. 35. § 25. And in the decisions since the act which have preferred the posterior voluntary right, the *ratio decidendi* constantly given, is, that the comprising or adjudication had been allowed to lie over without infeftment or charge, (*See LITIGIOUS*); and, in the law-books, an infeftment and charge are equiparate; Stair, lib. 3. tit. 2. § 20. not only with respect to other creditors, but third parties, such as tenants, whom an adjudger who has charged can remove; Stair, lib. 3. tit. 2. § 23.

Nor does this doctrine endanger the security of the records; for the letters of horning will be found in the signet-office; and, if they were taken out, it is to be presumed they were executed; at least, it is the business of the party to inquire; but, it is sufficient that the adjudication is shown by the record; after which, the creditor ought to inform himself, whether a charge had been given or not; for all the record does, or can do, in many cases, is, to put a party on his guard. Nor has ever any inconvenience been felt for want of a particular register of charges; but great would be the inconvenience, if every adjudger was obliged to take infeftment to secure himself from voluntary deeds; for this would bring a deal of trouble on the creditor, and a heavy load of expence upon the estate of the unfortunate debtor. Hence, in the case of Wallace of Cairnhill, *voce LITIGIOUS*, (*Mora*), it was well argued, that there could be no *mora* after the charge, at least, during the legal; and accordingly it was decided, that the adjudication with a charge was preferable to an annualrent-right, though the adjudication had lain over for four years before the voluntary right was granted; which is a judgment in point.

If then, Grieve's adjudication, on which a charge was given, be preferable to Mr Scot's, so must the Dutchess's, as it is within year and day of it, and consequently entitled to the whole benefit of it by the act 1661, which statutes,

that all adjudications within year and day of the first effectual one, by infestment or charge, 'shall come in *pari passu* together, as if one comprising had 'been deduced and obtained for the whole respective sums contained in the 'foresaid comprising.' The plain meaning of which is, that the first adjudger is to be considered as trustee for all the after adjudgers within year and day of him, whose adjudications are held *fictione juris* to be contained in his; so that they have no occasion to proceed further, but may rely upon his diligence; which accordingly most adjudgers have done, almost never putting themselves to the trouble even of another charge.

That the adjudgers, within year and day of the first effectual one, should be in every respect on the same footing with him, will be still more clear, on considering the alteration introduced by the act 1661. Before it, the second adjudger carried no more than the reversion of the first. By this act, he divides the subject with him, as if his debt had been contained in the first adjudication. Now, it would be absurd to make him share the right, and yet not communicate to him the benefit of the charge given by the first adjudger, in order to protect him as well as the other from voluntary deeds. Besides, Stair lays it down as uncontrovertible, that, though the first adjudger be paid, the second has, notwithstanding, the benefit of the diligence, lib. 3. tit. 2. § 14.; lib. 4. tit. 35. § 25.; which evinces, that one adjudication is held to have been led for both; and, if the second adjudger has the benefit of the first adjudication, in this respect, why not in every other? And, how can the benefit of it be divided, without derogating from the law, which says, that one comprising shall be considered as led for both? Accordingly, so the decisions have gone, Boyd *contra* Justice, *voce* POSSESSORY JUDGMENT; Straiton *contra* Bell, No 26. p. 255; Brown *contra* Nicolas, No 65. p. 2821.; which last is only quoted to show the opinion of the Court at that time concerning the communication of the infestment or charge on the first adjudication.

If the benefit of the first adjudger's charge be denied to the second adjudger, so must that of the first adjudger's infestment; the consequence of which would be ruinous to the debtor, as every adjudger would be laid under the necessity of infesting himself. Hitherto the nation has entertained a contrary opinion, as is obvious from every ranking that comes into Court; in none of which are there as many infestments as adjudications; but, on the contrary, it appears that every posterior adjudger has trusted to his having the benefit of the diligence of the first. To find, therefore, that the diligence of the first is not communicated, would introduce a novelty troublesome to creditors and destructive to debtors.

There are two specialties in this case which ought to have some weight. 1st, The Duke of Douglas, the second adjudger, was himself superior of the lands adjudged; and, as he must have known of the charge given him by the first, it is no wonder he did not think of charging himself.

No 72.

2dly, The first adjudger insisted in a process of mails and duties in 1747, against the tenants of the lands in question, of which, as well as of the charge, the second adjudger should have the benefit; and, according to the decision above mentioned, Boyd *contra* Justice, the Duke might have appeared in that process, and been ranked *pari passu* on the rents.

Replied for Mr Scot: He admits, that, by the common principles of law, as well as by the act 1621, legal diligence cannot be frustrated by the voluntary deeds of the debtor; but then this general rule is qualified with this exception, unless the creditor fall *in mora*, and delay unnecessarily to complete his diligence. Hence, in the case of horning, which is one of the diligences mentioned in the statute, it has been several times determined, that a delay of some months in denouncing has stopped its effect, Home and Lyle *contra* Dalrymple, *voce* HORNING; Young *contra* Kirk, No 162. p. 1078.; Drummond *contra* Kennedy, No 164. p. 1079. The analogy between the cases and the present is obvious. The statute says nothing of denunciation; but that being the completion of diligence by horning, the Court justly thought, that any unnecessary delay sufficed to secure third parties from any challenge upon it.

Apprising is another diligence classed along with hornings in the act; which is demonstration, that it was not reckoned a complete diligence; for, had that been the case, it would have been left to protect itself from voluntary deeds; and therefore, an adjudger, who, after obtaining his decret of adjudication, goes no further, is *in pari casu* with a creditor who fails to denounce upon the charge.

That an apprising or adjudication with a charge, is not an ultimate step of diligence, beyond which the creditor is not obliged to go, is laid down by Sair, lib. 3. tit. 2. § 21.; Bankton, lib. 3. tit. 2. § 48. 49.; and Erskine, lib. 2. tit. 12. § 6. 10.; and so the Court has ruled in a multitude of cases collected in the Dictionary, *voce* LITIGIOUS. The delay was sometimes longer, sometimes shorter; but these decisions concur in establishing this proposition, that an unnecessary delay removes the litigiousity, by which the debtor's hands were tied up, and third parties interpellated; and it would be extremely hard that this litigiousity should continue for 30 or 40 years.

As to the *second*, It is not left to conjecture for what purpose or end the correctory statute 1661 was enacted; for, its preamble expressly bears, That it was for the relief of creditors living at a distance, who 'were frequently prevented by more timeous diligence of other creditors.' The evil which the law meant to remedy, related singly to the competition of complainers among themselves, and the way it took to remedy this evil, was, to bring them all in *pari passu* within a certain time. To fix which, the first effectual adjudication was, *ad hunc effectum*, declared to be that on which infestment had followed, or exact diligence been done to obtain it; which, by after practice, was explained to be a charge against the superior; so that the expression in the act, 'a fine comprising had been led for the whole,' imports no more than a communication of

the first effectual comprising to the rest in competition with one another, but not such a communication as to influence the rights of third parties, which must be governed by the general rules of law; and so it has been understood by all our lawyers and decisions, Stair, lib. 3. tit. 2. § 39.; Bankton, lib. 3. tit. 2. § 54.; Erskine, lib. 2. tit. 12. § 14.; Brown *contra* Nicolas, No 65. p. 2821.; Aikenhead, No 66. p. 2823.; 28th July 1739, Chalmers of Gadgirth *contra* Sir James Cunningham, which is not in any printed collection, but is upon record, D. M. F.* and, as the communication introduced by 1661 is not confined to particular adjudications within year and day of the first effectual one, but extends to all prior adjudications, the consequence of the Dutchess' argument, if good, would be, that every such prior adjudger, though he had done nothing on his adjudication for 30 years, would be preferable to all posterior purchasers or creditors, and even to those who had contracted with the debtor before the first effectual adjudication, but had not taken infeftment till after a charge or infeftment had followed upon the adjudication.

Duplied for the Dutchess: An adjudication, after expiry of the legal, differs very much from what it was during the currency of the legal. It is to be considered as a judicial conveyance after the legal is run, not as a step of diligence rendering the subject litigious; and therefore, in competition with another conveyance, the first infeftment will give the preference; but, while the legal is current, the law does not oblige creditors to take measures for obtaining a feudal title; because it is uncertain, during the legal, whether a right will ever be absolutely vested in them. Infeftment is indeed necessary to an adjudger for securing him against the effect of voluntary deeds granted *prior* to the citation in his adjudication, (which was the case with all the voluntary deeds preferred by the decisions quoted for Mr Scot); and an infeftment or a charge is necessary to make an adjudication effectual in the sense of the act 1661; but neither is necessary to secure the adjudger against voluntary deeds posterior to this adjudication; therefore an adjudger cannot be *in mora* during the legal; for, though it is reasonable that the debtor's hands should not be for ever tied up, yet, so long as the adjudger can reap all the benefit of his diligence, when considered only as a diligence, and not in the other light of a disposition, without taking a step so extensive as infeftment, he is not guilty of negligence; and, upon this principle, was decided the above mentioned case of Cairnhill, which is the latest but one quoted by Mr Scot. A shorter time for completing seems to be allowed by the old than by the recent decisions, owing probably to there being of old no certain record by which creditors or purchasers could discover adjudications, which they now can do; and, in fact, for many years past, no considerable estate has been purchased, or sum of money lent on heritable security, without searching the record of adjudications, which Mr Scot did before he lent his money, and was informed by it of the Duke's adjudication, upon which he demurred, till a sum was deposited for clearing it; but which was not

* See APPENDIX.

No 72. so applied. But, if Mr Scot now prevails, it does not occur of what use this record of adjudications will be.

THE LORDS found, 'That, in this competition, Walter Scot, the annual renter, is preferable, and prefer him accordingly.' And, upon advising a reclaiming bill and answers, 'Their Lordships adhered.'

N. B. It was at first further *pleaded* for the Dutchess, That the Duke being himself superior of the lands of Wauchope, his adjudication consolidated the property with the superiority, and was therefore preferable to all other adjudications or voluntary rights, according to Stair, lib. 3. tit. 2. § 22.; but this was afterwards given up as untenible; see Lord Bankton, book 2. tit. 11. § 14. See LITIGIOUS.

For Scot, *Lockhart et Swinton.*

For the Dutchess of Douglas, *Burnet et Rae.*

J. M.

Fac. Col. No 142. p. 332.

SECT. XII.

Infestment upon Resignation with other Rights.—Charters of Resignation and Confirmation.—Liferents with other Rights.

1666. *January 17.*

LORD RENTON, JUSTICE CLERK, *against* FEUARS of COLDINGHAM.

No 73.
A charter upon resignation, where the original infestment was not produced, was sustained *in re antiquo*, in opposition to other charters of posterior date.

MY Lord Renton, as being infest in the office of Forrester, by the Abbot of Coldingham, containing many special servitudes upon the whole inhabitants of the Abbacy, as such a duty out of waith goods, and out of all timber cutted in the woods of the Abbacy, with so many woods, hens, and a threave of oats, out of every husband land yearly; pursues declarator of his right, and payment of the bygoness since the year 1621, and in time coming; both parties being formerly ordained, before answer, to produce such writs and rights, as they would make use of; and these being now produced, the pursuer *insisted*, *primo loco*, for declaring his right as to the threave of oats.—It was *alleged* for the defenders, absolutor, because they had produced their feus granted by the Abbot of Coldingham, prior to the pursuer's infestment, free of any such burden.—It was *answered*, The defence ought to be repelled, because the pursuer has not only produced his own infestment, but his predecessors' and authors' infestments, and his progress to them, viz. the infestment granted to David Evin, of the forretrie, containing all the duties aforesaid, which is before any of the defen-

No 73.

ders infeftments produced.—It was *duplied* for the defender, That the infeftment granted to the said David Evin is no original infeftment, but bears to be granted on his mother's resignation, and has no special *reddendo*, but only relative to the former infeftments; and therefore, unless the former infeftments were produced, or it were instructed, that the resigner had right, the infeftment upon resignation can operate nothing, especially never being clad with possession, as to the threaves of oats in question; for there is great odds betwixt infeftments granted by kirkmen, who are but administrators of the benefices, and others who have *plenum dominium*; so that infeftments upon resignation of kirkmen are to be understood to confer no more right than the resigner had, and not to constitute any original right where there was none before; in the same way as infeftments granted by the King, upon resignation, are but *periculo petentis*, and give no right further than the resigner had, even against the King.—It was *answered* for the pursuer, That his reply stands relevant, and he produces sufficiently to instruct his predecessor's right; for there is no law nor reason to compel parties to produce the old original feus granted by kirkmen, but infeftments upon resignation are sufficient; neither is the case alike as to the King and kirkmen, because things pass not by the King *ex certa scientia*, which no other can pretend; but in this case, declaring a right granted by an Abbot, with consent of the Convent, it must be considered what made a right the time that it was granted, when there was no more required than his concession, with consent foresaid, which is sufficient against him and his successors; neither can they pretend that such grants are *salvo jure suo*; and if in matters so ancient, original infeftments from kirkmen behoved to be produced, that neither precepts of clare constat, nor infeftments upon resignation were sufficient; few rights of kirklands in Scotland would be found valid.

THE LORDS repelled the defence, in respect of the reply, and found this infeftment upon resignation sufficient.

Fol. Dic. v. 1. p. 183. Stair, v. 1. p. 338.

CREDITORS OF LANGTON *against* LADY MARY KENNEDY.

No 74.

FOUND that in a competition between charters of resignation and confirmation past in Exchequer, and sealed the same day, the charter of confirmation is preferable to the charter of resignation, the latter being complete by sasine, and the former incomplete till sasine thereon.

Fol. Dic. v. 1. p. 183. Harcarse, (INFESTMENT.) No 524. p. 172.

No 75.

Mode of estimating a relict's interest for a liferent annuity, in competition with creditors. See epitome of the case in the Synopsis.

1713. December 3. COLONEL JOHN ERSKINE *against* AIKENHEAD.

COLONEL ERSKINE having obtained a decret against Aikenhead, as representing her husband, and she having suspended and produced her husband's confirmed testament, wherein she is confirmed executrix creditrix upon her husband's contract of marriage, providing her to 600 merks of yearly liferent, she is thereupon reponed against the decret.

The Colonel insisted for a patrimonial share of the inventory of the defunct's testament; effeiring to the sum due to the pursuer and the defender, because that diligence was done upon his debts within six months after the defunct's decease, and that by the current of late decisions, relicts are found to have no preference upon their contracts of marriage; which the LORDS sustained. The question then occurred, how the inventory of the confirmed testament should be divided betwixt the pursuer and defender, the inventory being very far short of their respective debts, and consisting chiefly of the price of the merchant ware and plenishing bearing no interest.—It was *alleged* for the Colonel, That the relict's credit being her liferent annuity, must be estimate at five, six, or seven years purchase as the Lords shall find just, and she to have a proportional part of that sum compared with his; and *alleged*, That the Commissaries were in use to put such a valuation upon wives' liferent provisions, and to prefer them to other creditors at that estimate; and likewise there was an estimate put upon the liferent in order to regulate the quote payable out of the free gear.

It was *answered*; The Commissaries were indeed in use to put a valuation upon liferents, in order to liquidate the quote due to bishops, as they were warranted to do by a special act of Parliament, 1661, but they were neither in use nor had power to put any estimate upon a wife's liferent to any other effect; because, if a wife should die in a short time within a term, two or three of the creditors would have the benefit, and the defunct's means could not be subjected by any deed of the Commissaries to the burden of the liferent longer than the same did continue; on the other side, neither could the Commissaries restrict the liferent provision though she should survive twenty, thirty, or more years; and in this case the defender had already survived her husband sixteen years, or thereby.

THE LORDS having considered and reasoned this case, and finding no decision upon debate in the like case, they found the rule of proportion and division of the inventory should be as follows, viz. That the wife should be stated as a creditor in the sum of 10,000 merks, answerable to her annuity of 600 merks yearly, and that the inventory should be divided betwixt the Colonel and her proportionally, effeiring to his sum as it was the time of the confirmation, and the said 10,000 merks; and that the relict should have retention of her said proportion of the inventory confirmed during her lifetime, in satisfaction of her annualrent of so much of the 10,000 merks as her share did amount

to, she finding caution to make the said sum retained by her, furthcoming to the Colonel, and others having interest at her decease, and reserving to her representatives to affect the same, for the inlakes of her liferent annuity proportionally with the other creditors; and found her presently liable to the Colonel for his proportional share of the inventory confirmed.'

Fol. Dic. v. 1. p. 182. Dalrymple, No 101. p. 142.

* * Forbes reports the same case :

MARGARET AIKENHEAD being confirmed executrix creditrix to the deceased George Reid of Broadlees, her first husband, for her liferent provision of 600 merks; she was pursued within six months of her husband's death, by Edgerton Snow, for payment of a debt resting to him by the defunct, which was assigned by Snow to Colonel Erskine.

THE LORDS found, That the Colonel's author having done diligence within six months of the defunct's death, the inventory of the testament ought to be divided proportionally betwixt him and Margaret Aikenhead the defender, after allowing to her payment of the funeral charges as a privileged debt in the first place; and that the rate of proportion and division of the remainder ought to be as follows, viz. Margaret Aikenhead to be reckoned as a creditor in the sum of 10,000 merks, as answerable to her liferent annuity of 600 merks yearly, and the Colonel in the debts resting to him, or his authors, at the time of the confirmation: Again, she was found to have right to retain her proportional share of the inventory, to be stated to her at the date of the confirmation, as a principal sum bearing annualrent, and the annualrents thereof to be imputed in satisfaction of the annualrent of so much of the sum of 10,000 merks, and to find caution to make furthcoming the sum allowed to be retained by her at her death to the Colonel, and all other parties having interest; reserving to her to affect or retain the same for the inlakes of her liferent provision at her death, in proportion to what shall be found due to the Colonel as accords; and found her liable to the Colonel for his proportion, without prejudice to him to restrict her interest on the executry, in so far as she has uplifted or possessed any separate estate or effects belonging to the defunct.

Forbes, MS. p. 9.

S E C T. XIII.

Betwixt Singular Successors, where the Common Author is not
Infest.

1676. June 20.

BROWN *against* SMITH.

No 76.

An assignation to an incomplete real right, though directly done and intimated, has no effect against another singular successor completing his right by infestment.

ANDREW SUTOR having disposed the equal half of the east side of Letsie to Ronald Brown, with power of resignation; the said Ronald grants an infestment of annualrent to James Brown, and thereafter disposes the land irredeemably to David Smith in liferent, and John Smith in fee, and assigns the disposition and procuratory therein granted to him by Andrew Sutor, whereupon the Smiths are infest as assignees to the disposition and procuratory, but Ronald Brown the cedent was never infest. James Brown the annualrenter pursues pointing of the ground, wherein the Smiths compear and *allege*, That the purchaser's infestment is null, neither being clad with possession, nor given by one who was infest, or had power to give infestment, but by Ronald Brown, who was never infest.—It was *answered*, *imo*, That Ronald Brown's disposition (before any infestment) was transmissible by assignation, and the consitution of this annualrent imported an assignation, and the registrate sasine was equivalent to an intimation; *2do*, Infestment having followed upon Ronald Brown's disposition, albeit in the person of his assignee, yet it compleats his right, and makes it a real right, and as supervening accresseth to the annualrenter.

THE LORDS sustained the defence, and repelled both the replies, and found, That an assignation to an incomplete real right, though it had been directly done and intimate, had no effect against a singular successor completing his right by infestment; and found, That the real right did never accress to the annualrenter's author Brown, who was never infest, but only to Smith, the author's assignee.

Fol. Dic. v. 1. p. 183. Stair, v. 2. p. 428.

1710. December 8.

JOHN RULE, Son to the deceased JOHN RULE, Chirurgeon in Dumfries, *against*
ANDREW PURDIE Merchant in Edinburgh.

No 77.

A naked disposition of lands was found to de-
nude the

MARTIN NEWAL, merchant in Dumfries, made a disposition, containing a procuratory of resignation of a tenement of land in that burgh, to James Robson merchant there; who, without being legally infest, disposed it to John Rob-

son his brother, Andrew Purdie's author, with a procuratory to resign, precept of sasine, and assignation to all writs in his person; and John Robson was infeft in *anno* 1693; thereafter John Rule, chirurgion in Dumfries, as creditor to James Robson, adjudged from him Martin Newal's disposition, and upon the procuratory therein, John Rule, as heir to the adjudger his father, being infeft, raised a process of mails and duties against the tenants. Andrew Purdie, who derived right from John Robson, compearing for his interest, craved preference; in respect the disposition to his author was anterior to John Rule's adjudication, and did totally denude James Robson.

Replied for John Rule; The disposition to John Robson, Purdie's author, never having been intimated till the present competition, after that John Rule, by adjudging the procuratory in the disposition granted by Newal to James Robson, and infefting himself thereon, acquired the real right, which till then continued in the person of Newal; he, Mr Rule, as having the first complete right, is clearly preferable: For albeit adjudications, which are legal assignations, require no intimation to complete them; yet naked dispositions, as other personal assignations, transmit not effectual rights to the receivers, without intimation, and are preferable according to the date of the intimation.

Duplied for Purdie; A disposition of an heritable right whereon no infeftment hath followed, doth fully denude the disposer, without necessity of infeftment or intimation, The Laird of Anstruther *contra* Black, No 13. p. 829.; and in the late case Dewar against French, No 12. p. 241. it was found, That Mr David Dewar's first adjudication of lands, to which his debtor had only right by disposition, without infeftment, did quite denude the debtor; and he was preferred to David French, a posterior adjudger, who stood infeft by virtue of the procuratory of resignation contained in the common debtor's disposition. The reason of the disparity betwixt a disposition of land, and an assignation to a moveable bond, is, because the land is properly debtor to one that hath a disposition thereof, and so that disposition wants no intimation to perfect it; whereas, an assignation of a bond must be intimated to the granter, who is debtor, to put him *in mala fide* to pay the cedent. It is in vain for Rule to plead upon Martin Newal's not being divested by the disposition to James Robson; seeing the question is not betwixt persons deriving right from Newal, who was last infeft, but only betwixt those whose common author James Robson, being never infeft, was sufficiently denuded by his disposing the procuratory to John Robson, before John Rule adjudged; *2do*, *Esto*, that intimation had been necessary to perfect the disposition in favours of John Robson; yet that, being an heritable right, was sufficiently intimated by his public infeftment, and the long debate in the present competition, and several years possession before John Rule's infeftment as heir to his father.

Triplied for John Rule; John Robson's infeftment cannot supply the want of intimation of the disposition in his favours; because sasines are not properly intimations, but only publications of real rights; and though John Robson

No 77.

granter *funditus*, having himself only a disposition with procuratory and precept; so that nothing remained for him to dispo-
ne, by legal or voluntary conveyance; consequently the dispo-
see was preferred to a posterior ap-
priser, who had attempt-
ed to com-
plete his right by obtaining infeftment, on the debt-
or's original procuratory.

No 77.

might, by virtue of the general clause in the disposition to him assigning to all writs, have been infeft upon the procuratory in Newal's disposition; yet he not having taken infeftment upon that, but only upon the procuratory in the disposition, granted by James Robson, (who, being never duly infeft, could give no effectual precept for infefting another,) John Robson's sasine is null, as granted *a non habente potestatem*; and so cannot be sustained as an intimation of the procuratory in Newal's disposition. Nor can the decision betwixt Dewar and French influence the present case; in respect both Dewar and French were adjudgers; and the first adjudication, being a legal assignation, was a complete assignation without intimation; whereas a simple disposition affords no *jus in re*, but only *jus ad rem*, which, though effectual against the granter and his heirs, or against tenants, where no person competes upon a better right, is never complete against singular successors, till sasine follow thereon.

THE LORDS found, That James Robson, having only a personal right by disposition without infeftment, the disposition made by him to John Robson, Andrew Purdie's author, did fully denude him, without necessity of intimation; so that the subject could not be thereafter adjudged from him; and therefore preferred Andrew Purdie.

Fol. Dic. v. 1. p. 183. Forbes, p. 445.

1710. December 19.

COLONEL ERSKINE against SIR GEORGE HAMILTON.

No 78.

A party who had acquired right to an apprising, without taking infeftment, granted an infeftment of annualrent out of the lands. He afterwards disposed the lands to another party. The prior right was preferred.

AN apprising being led of the lands of Tulliallan, at the instance of James Henderson, son to John Henderson of Fordel, against Sir John Blackadder in anno 1633, upon which infeftment followed in the 1634; in the year 1670, Alexander Earl of Kincardine (who acquired right to this apprising without taking infeftment) did, in the 1673, grant an infeftment of annualrent out of these lands to the Lord Cardross for 50,000 merks, and in the year 1676 granted an heritable bond of relief to him of several debts and engagements, upon which the Lord Cardross was infeft. In the year 1678, the Earl disposed the lands in favours of Sir Robert Milne, Sir George Hamilton's author, who was publicly infeft in the year 1680. Colonel Erskine, having the Lord Cardross's right in his person, craved to be preferred to the lands of Tulliallan, upon the disposition of Henderson's apprising in favours of the Earl of Kincardine.

Answered for Sir George Hamilton; He had best right to the disposition of the apprising made to the Earl of Kincardine; in respect it was directly conveyed to Sir Robert Milne by the foresaid disposition from the Earl, containing a general assignation to all dispositions and other rights he had to the lands; and the infeftments of annualrent and relief, in favours of the Lord Cardross, were void and null as to the lands of Tulliallan, the Earl having no real right thereof in his person, but a simple disposition, never completed by infeftment, which could not entitle him to pass a real right to the Lord Cardross.

Replied for Colonel Erskine ; Sir George Hamilton, by virtue of the disposition made by the Earl to Sir Robert Milne, of the lands, writs, and evidents, cannot exclude Cardross's anterior infeftment of relief ; for the assignation to mails and duties in Cardross's bond of relief, upon which a decret of mails and duties followed, did effectually denude the Earl of the disposition to Henderson's apprising, which hath no further effect in law than an assignation to mails and duties ; as a translation denudes an assignee in any other case. *2do*, A right to the property of lands doth tacitly convey any lesser right that stood in the granter's person, according to the rule, *majori inest minus* ; therefore the obligation to infeft, with the procuratory of resignation contained in Cardross's bond, which was a qualified right of property, did certainly convey to him any inferior right to these lands, and consequently the disposition to Henderson's apprising ; and a procuratory of resignation, as my Lord Stair, III. 2. 8. says, hath the effect of a disposition. So the common way of tailzieing estates is not by a formal disposition, but by a bond obliging to infeft the heirs of tailzie, containing procuratory of resignation, or by a procuratory of resignation in their favours, without either bond or disposition ; which tailzies could not be disappointed by a creditor of the maker adjudging some old apprising to which his debtor had acquired right without infeftment ; for otherwise the rights of many of the best estates in Scotland might be called in question, and laid open, it being ordinary for persons once infeft to acquire other rights without expeding infeftment thereon, or being nicely cautious to infeft upon the most preferable. *3tio*, An apprising, disposed to one already infeft, is so far extinguished and renounced, that it cannot thereafter be made use of against the acquirer or his successors ; though they may use it as a standing right against any third party pretending a better right to the lands upon which they were infeft.

Duplied for Sir George Hamilton ; Any pretended implied disposition in the obligation to infeft, did not enable the Lord Cardross to resign by virtue of the procuratory, or take infeftment by virtue of the precept in the disposition granted by Sir John Henderson to the Earl. And albeit, a subsequent infeftment in the Earl's person might have accrued to the Lord Cardross ; yet the Earl's right having continued ever in the terms of a simple disposition, Cardross's infeftment from him is null, as flowing *a non habente potestatem*. *2do*, As the foresaid obligation to infeft could convey no real right, neither could it hinder the Earl to grant a direct disposition and assignation to Sir Robert Milne ; for, even a second disposition completed by infeftment would have carried the Earl's right away in prejudice of the receiver of a prior disposition, as was decided 20th June 1676, Brown *contra* Smith, No 76. p. 2844.

Triplied for Colonel Erskine ; The decision betwixt Brown and Smith makes nothing for Sir George ; because, *1mo*, The question there was with an infeftment of annualrent, which is not a right of property, and could not be understood a conveyance of the property that stood in Brown's person ; whereas the infeftment of relief given to Cardross was a right of the same nature with that

No 78.

which stood in the Earl's person, and might be transferred by any writ *inter vivos* shewing his intention so to do. *2do*, Brown the annual renter's infeftment was never clothed with possession, and therefore it seemed just to prefer Smith, a singular successor, who first perfected his right.

THE LORDS found, That Cardross's right of relief, containing a procuratory of resignation and assignation to the mails and duties, conveyed all rights personal as well as real that were in the Earl's person, for security and relief of the debts therein contained; and therefore found, that the Colonel's right being prior to Sir Robert Milne's right, is preferable.

Fol. Dic. v. 1. p. 183, Forbes, p. 455.

No 79.

1733. November 20. SINCLAIR against SINCLAIR.

A NAKED disposition of lands was found to denude the granter *funditus*, who had no more himself than a disposition with procuratory and precept, so that nothing remained with him thereafter to be carried by a legal or voluntary conveyance; upon which footing the disponee was preferred to a posterior appriser, whose apprising was led against the common author, though the appriser had gone on to complete his right by obtaining infeftment upon the procuratory contained in his debtor's disposition. See APPENDIX.

Fol. Dic. v. 1. p. 183.

1737. June 22.

BELL of Blackwoodhouse against JOHN GARTSHORE, Merchant in Glasgow.

No 80.

A personal conveyance of a personal right to land, does not denude the granter, or bar a second conveyance; the first infeftment in such a case being always preferable.

CHATTO having purchased an estate at a public sale, extracted his decree of sale; and, without infefting himself, he conveyed the same to Bell of Blackwoodhouse. Thereafter, John Gartshore, creditor to the said Chatto, adjudged from him the decree of sale with the lands; and being infeft upon his adjudication, his was the first completed real right.

In a competition between them about the mails and duties, it was *pleaded* for Bell, That, by the conveyance to him, Chatto was *funditus* denuded of his personal right; and that nothing was left with Chatto to be carried by Gartshore's adjudication. And to show that this is law, the decision, Rule, No 77. p. 2844. was cited, with many of a later date, all combining to support a proposition that has governed our practice many years as an indisputable rule of law, *viz.* that a disposition to land without infeftment, is transferred *funditus* from the disponent to the disponee, by a simple disposition, without other solemnity.

It was *pleaded* for Gartshore; That he stands infeft in the subject, having followed out the whole solemnities of the law of Scotland, necessary to establish

the feudal-right in him; and if his right, or the right of those who may purchase from him, can be defeated by a latent disposition granted by his author, purchases in Scotland will not be more secure than in a neighbouring country, where no records are kept of land-rights and conveyances. This case therefore deserves to be thoroughly weighed; and, to that end, the following observations are offered.

1mo, As consent alone transfers not property, delivery is a necessary solemnity for that end; actual delivery, where the subject is moveable; symbolical delivery, where it is immoveable.

2do, A disposition of land, with procuratory and precept, imports no more but the grantor's consent in favour of the disponee, and a mandate or order to deliver the subject to him. Before sasine, which is the symbolical delivery, the disponee is not proprietor, nor is the disposer divested of his property.

3tio, Supposing the same land to be disposed, with procuratory and precept, to two or three different purchasers, an opportunity is given to each of them to acquire the property; but he only among them becomes proprietor who first obtains infeftment. This solemnity transfers the property, and of course extinguishes the disposer's property, with all the personal rights founded upon it.

4to, In this supposed case, the several purchasers have each of them the proprietor's consent to convey his property to him; and each is entitled to have the land delivered to him, which leaves it in the bailie's power to give delivery to any one of them he thinks proper.

5to, Of a disposition granted to a man and his assignees, the meaning is, that sasine may be given either to the man or his assignee. When, therefore, a disponee assigns his personal right, the assignee is entitled to demand delivery; which, at the same time, bars not the disponee himself to demand delivery; and he of the two who is first infeft becomes proprietor, precisely as in the former case of several dispositions granted by the same proprietor.

This evinces that a procuratory and a precept are in their nature alternative; being a mandate or order to give delivery to the disponee himself, or to any having his consent. And, when delivery is made to one or other, the property must of course be transferred to that person to whom delivery is made, because in him concur the consent of the proprietor with delivery, all that is necessary, by the principles of law, to transfer property.

The rule, that a personal conveyance denudes of a personal right, seems to proceed from an error in law, as if an assignment to a disposition, containing procuratory and precept, did necessarily denude the cedent, so as to make it no longer lawful to deliver the subject to him, but only to the assignee. And were this so, it behoved to support the doctrine in all its consequences; for if the disponee himself be no longer entitled to demand delivery, it must be yielded, that neither can he entitle any other to demand it: that no person can give what he has not, is a clear principle in philosophy as well as in law.

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But that a conveyance of a disposition, containing procuratory or precept, has no such effect, appears not only from what is said above, but is confirmed, past all doubt, from an established practice admitted by all to be effectual in law; which is, that after conveyance of a procuratory or precept, the assignee commonly infefts his author, and then infefts himself. Is this practice consistent with the rule, that a personal conveyance denudes of a personal right? Certainly not; for, if the disponent were *funditus* denuded of his personal right, by conveying it to another, his case would become the same as if the right never had been in him; and, consequently, sasine given to him would not be more effectual than if given to *John a Groat*. But, upon supposition that a procuratory or precept is a mandate or order in its nature alternative, empowering delivery to be made to the disponent, or to any other having his consent, the said practice is perfectly consistent; because delivery to either is good in law.

This acknowledged power, which an assignee has to infeft his author, puts an end to the dispute. If a disponent, even after assigning the procuratory and precept, can be legally infeft, it must follow, that the power to receive delivery continues still with him, which is all that is requisite to validate a second assignment; for, while the power of receiving delivery remains with the disponent, his consent to another's receiving it must be effectual. And, if he make twenty assignments, they are equivalent to so many dispositions granted by the proprietor himself; the person first infeft must carry the real right; for a plain reason, that the order is alternative to give infeftment to the disponent, or any other person having his consent.

And in this matter, the conveyance of real rights goes hand in hand with the conveyance of personal rights. An assignment to a bond, denudes not the cedent till the assignment be intimated; why then should an assignment to a disposition without any thing further, denude the cedent? Can it be thought that a disposition to land is transmissible with less solemnity, than a simple personal bond? But, to carry on the comparison, a case in personal rights shall be figured precisely similar to the present; an assignee to a bond, without intimating, makes two several conveyances; and the last conveyance is first intimated: it was never doubted, that the first intimation gives right to the bond. Here then we have it established, that a personal conveyance denudes not even of a personal assignment to a bond; and as little ought it to denude of a disposition to land. At the same time, the supposed case serves finely to illustrate the case in hand: An assignee to a bond, without intimating, conveys his right to several purchasers; each of them is equally entitled to take the proper steps for establishing the subject in his person; they are like so many creditors *in cursu diligentiae*; the first completed diligence carries the subject.

Having made out, that Bell's ground of preference is not supported by the principles of law, the next step shall be to enquire into the consequences that may result from it, particularly with respect to the records.

Probably the rule of a personal conveyance denuding of a personal right, has been introduced with respect to those cases where the rights in competition remain personal; and has inadvertently been extended to infestments proceeding from a common author not infest. And, were it to have no further operation, the harm would not be great, however erroneous the rule may be; for men would be put on their guard, not to purchase but from one infest. But the matter cannot rest here; for it shall be made evident, that, by this rule, there is as little security in purchasing from one infest as from one not infest.

The cases that hitherto have been brought before the Court are, all of them, like the present, between purchasers where the common author was not infest. But let us suppose that Garthshore, after being infest, had sold the land, and that the competition were between Bell and the purchaser; it is extremely obvious, that, if Chatto, the common author, was *funditus* denuded by his conveyance to Bell, the posterior conveyance from Chatto in favour of Garthshore, must be void, as flowing *a non habente potestatem*; that this void right cannot be validated merely by taking infestment; and that a purchaser from Garthshore would be in no better condition, *quia nemo dare potest quod ipse non habet*. The purchaser, therefore, in this supposed case, acquiring *a non domino*, could not be secure otherwise than by the positive prescription. Thus then it comes out clear, that, in making a purchase of a land estate, no man by this rule can have any security from the records, if there happen to be in the whole progress but a single author who was never infest; for there may be a latent conveyance from this author, which cannot be discovered from the records.

But the mischief spreads still more wide; for, *esto* every one of the authors had been infest, there remains the same uncertainty: one must have a disposition before he can be infest; and who knows, whether, before his infestment, he has not denuded himself by some latent conveyance: if so, his infestment is void as well as the titles of those who purchase from him.

No answer can be made for obviating such pernicious consequences, if it be not this, 'That one who purchases from a person infest, is secure, because he purchases upon the faith of the record.' But where is the law, that declares a purchaser to be secure against every latent claim which appears not upon the face of the records? We have no such law; and many cases may be figured where our records are defective, and give us no security. Our statutes have made a provision with respect to certain deeds, that they must be put upon record, under certification, that otherways they shall not be effectual against purchasers, such as sasines, reversions, &c. with respect to which, the records make us absolutely secure. But there are many deeds, in their nature good against purchasers, which are not appointed to be recorded; and there are others that admit not of being recorded.

And to show, that, by the legislature itself, the records are not held to be an absolute security, I appeal to the statutes concerning prescription. What

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use would there be for the vicennial prescription of retours, if a purchase from a younger brother served heir to his father were secure by the records, which cannot inform the purchaser that there is an elder brother existing? And, if such purchaser be not rendered secure till after the lapse of 20 years, is not this in effect saying, that the records give him no security in this case? There would be as little use for the positive prescription of 40 years; the obvious purpose of which is, to shut the door against every latent claim that otherways would affect the purchasers, though not appearing upon the face of the records. This makes it evident, that a purchaser from a person infest, is secure against no grounds of challenge that are in their nature good against purchasers, but such only as are appointed to be recorded. A latent conveyance, by a person not infest, is none of those grounds of challenge that are appointed to be recorded; and therefore, supposing such a latent conveyance to be good in its nature against a purchaser, the records will not secure him, nor any thing else, but the positive prescription of 40 years.

When thus stands the law, it is mere amusement to imagine, that in every case we have security from the records. Hitherto it has been reckoned, that if a purchaser search the records for 40 or 50 years backward, he is in safety to pay his money. But how lame must a purchaser's security now appear, when possibly the very day before infestment, his author may have conveyed away his personal right? In vain, after this, will any person attempt to magnify the security of the records.

With respect to the many decisions urged on the other side, the following observations were made. The first of them, Rule, No 77. p. 2844. stands upon a sandy foundation: the decision Dewar *contra* French, was pleaded as a strong authority in that case; and yet when we look into the decision, Dewar *contra* French, as compiled by Lord Fountainhall, (No 12. p. 241.) it proves the direct contrary. The case was this: "In a competition betwixt two adjudgers, the common debtor's right being a disposition with procuratory and precept, but no infestment, the first adjudger pleaded preference; his adjudication, which denuded the debtor of his personal right, being the first complete or effectual, and the other adjudger was not within year and day. It was urged for the other adjudger, that his was the first complete and perfected right; for, after having adjudged the dispositive, he proceeded to take infestment upon the precept therein contained. The Lords brought them in *pari passu*." This was in effect finding the last adjudication the first effectual, upon this medium, that the common debtor was not denuded by the first legal conveyance without infestment, but that the second legal conveyance, upon which the first infestment followed, was preferable; which is the very point pleaded for Garthshore, and is directly contrary to the decision Rule *contra* Purdie. It comes out, then, that this decision, which is the first that tends to establish Bell's doctrine, is founded upon a mistaken authority. And the later decisions have

proceeded upon the same mistake, without adverting to the fatal consequences. At the same time, it must appear of great weight, that, from the first traces we have of our law down to the 1710, we find no support to this doctrine from any sort of precedent or authority: on the contrary, as the opportunities of pleading it must have been frequent, it is convincing evidence of its being disregarded by our judges and lawyers, that we find not any person putting in his claim upon it, save once in a decision compiled by the Lord Stair, *Brown contra Smith*, No 76. p. 2844.; where a purchaser of land, having a disposition with procuratory and precept, first gave an heritable bond for a sum of money, and then sold the land to a third party, assigning the procuratory upon which the purchaser was infeft. 'THE LORDS found the purchaser preferable to the creditor, upon this medium, that an assignment to an incomplete real right, though it had been directly done and intimate, could have no effect against a purchaser completing his right by infeftment.' This is the footing the Court went upon, if we can give faith to Lord Stair.

But, above all, we have the sense of the legislature itself against this doctrine. Had it ever been dreamed, that a latent disposition may be such an impediment in the commerce of land, or other heritable subject, as is pretended, it is not supposable that our legislature, in establishing the records, would have totally neglected this impediment. After appointing sasines and reversions to be put upon record, nay even the smallest eiks to reversions, discharges, remunciations, &c. it would have been great blindness to overlook latent dispositions, more dangerous to purchasers than all the former joined together. This may justly be held an authority against the rule, indirect indeed, but little less weighty than an express act of Parliament.

THE COURT, in this case, abstracting from all specialties, pronounced an interlocutor in favour of the personal right, led by the weight of former decisions. But, upon a reclaiming petition with answers, a hearing in presence, and informations, they 'preferred Garthshore's real right, and refused a petition against this interlocutor without answers.'

Fol. Dic. v. 1. p. 183. Rem. Dec. v. 2. No 8. p. 16.

*** Clerk Home reports the same case :

WILLIAM CHATTO, senior, having right to a tenement in Kelso, failed in his circumstances; whereupon it was brought to a sale by his creditors: And Alexander Oliphant having purchased the same, he disposed it to William Chatto younger; in which disposition he conveyed to him the decret of sale, in order to his obtaining himself infeft; however, neither Oliphant nor Chatto junior, were infeft.

While young Chatto's right stood thus uncompleted, he granted an heritable bond thereon to Bell of Blackwoodhouse, upon which he entered to the possession: And, some time thereafter, John Garthshore, who was likewise creditor to

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For Blackwoodhouse it was *argued*; That the right in young Chatto (the common author) being merely personal and incomplete, he was fully denuded thereof by the first conveyance; of course, the infeftment that followed on Garthshore's title behoved to fall; as the right on which it proceeded was void. It is true, that young Chatto might have been infeft; seeing the radical right still remained with him, notwithstanding the first conveyance; and, if that had happened, the first deed would have evanished in competition with a posterior disponee duly infeft; because, in conveyances from a person infeft, it is not the dates of the titles, but of the infeftments (whereby he is denuded), that is to be regarded. But, as that method was not followed, the first right here must be preferable to the subsequent one, notwithstanding the radical right remained with young Chatto, in the same manner as in a question betwixt assignees to bonds; the assignation first intimated is preferable to a prior one not intimated. Neither does this doctrine any ways tend to unhinge the securities arising from the records, as Garthshore did not contract upon the faith of them, his author not being infeft; and, any person who may purchase from him, must see, from the records, that his immediate author not being infeft, the personal right that was in him, might have been qualified or alienated by a personal deed.

Besides, the point now pleaded for, seems well founded in the act 1617; where it is declared, 'That it shall not be necessary to registrate any bonds and writs for making reversions, unless the sasine pass in favour of the parties makers of the said bonds or writs.' Consequently, if Chatto younger had granted a back-bond of reversion, or any other deed in favour of Bell, it would have been good against his competitor, notwithstanding his infeftment. And surely, it cannot be doubted, but a direct disposition or conveyance of an incomplete real right, must be equally available to affect it in prejudice of the granter's singular successors, who obtain themselves infeft, when their author was not infeft, as a latent back-bond. In point of justice, there is no difference; and, in a favourable view, the direct deed surely deserves more countenance.

On the other hand, it was *urged* for Garthshore; That, so long as the competing rights remained personal, the rule, *Prior tempore potior jure*, behoved to take place; but, as there was more in young Chatto than a mere personal right, to wit, a power and faculty in him to have made it real, by which only the *dominium* of the subject could be transferred; and this being carried, in virtue of the charter from the superior, whereby old Chatto was denuded, the real right was established in Garthshore's person. It is true, he might have infeft young Chatto, in order to have validated the purchase he should make from him; but the method here followed, of establishing a legal title to the decreet of sale, is the same thing with the resignation as flowing from old Chatto, whereby all intermediate personal rights came to be absorbed, and the real

right in old Chatto, by the act of the superior, vested in Garthshore; so that he alone, and no other, was liable for all the casualties arising from the fee; consequently, he must, from thenceforth, be entitled to the rents and profits thereof. The parallel brought from assignments to personal rights tends to support the contrary to what it is adduced to prove; for, as it is acknowledged, that, notwithstanding of a first assignation, the radical right remains with the cedent, in so much that an after-assignation first intimated will be preferred; so the radical right of the fee remaining with old Chatto, the decret of sale and after-assignation, gave a power to the assignees to complete their real rights, and divest him; which being done, the radical right thereafter came to be vested in that party who completed the real right; as in assignments to personal rights, it is performed by the first intimation. Nor does the clause in the act referred to make any alteration in the present question; because it does not say, That the first latent bond of reversion, upon a personal right, must have preference to others, who having carried the same, have completed it, by establishing a real right thereupon; this being left to the disposition of the common law, as it stood before the act; and by that, Garthshore, as having the only complete real right in the subject, falls to be preferred to his competitor; who, suppose his titles were now lawfully made up, would have no manner of right in it at all.

THE LORDS preferred John Garthshore.

C. Home, No 59. p. 102.

* * * See No 85. p. 2860.

SECT. XIV.

Betwixt Rights flowing from different Authors.—Husband with Wife's Assignees.—Between Real and Personal Creditors, where the Debtor's Infestment Reduced.—Singular Successor of a Reverser, with the Heir of a Nominal Fiar.—Disponee in Security with a Personal Creditor.

1667. February 1.

ANDREW SMEATON *against* TABBERT.

ANDREW SMEATON being infest in an annualrent out of a tenement in the Canongate, pursues a poinding of the ground, and produces his own infestment and his author's, but not the original infestment of the annualrent. It was *alleged* no process, until the original infestment were produced, constituting the annualrent, especially seeing the pursuit is for all bygones, since the date of the author's infestment; so that neither the pursuer, nor his immediate author have been in possession. *2dly*, If need be, it was offered to be proven, that before the rights produced, the authors were denuded. It was *answered*, That the

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In a competition of rights flowing from different authors, the eldest was preferred, tho' in *petitorio*, the other being in possession.

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pursuer hath produced sufficiently, and that his right was clad with possession, in the person of his mediate author, before the years in question. To the *second*, This pursuer hath the benefit of a possessory judgment by his infeftment, clad with possession, and is not obliged to dispute, whether his author were denuded or not, unless it were in a reduction.

THE LORDS sustained the pursuer's title, unless the defender produced a right anterior thereto; in which case, they ordained the parties to be heard thereupon, and so inclined not to exclude the pursuer, upon the allegiance of a possessory judgment; but that point came not fully to be debated: It is certain that a possessory judgment is not relevant in favours of a proprietor, against an annualrenter, to put him to reduce, because an annualrent is *debitum fundi*; but, whether an annualrenter possessing seven years, could exclude a proprietor, until he reduce, had not been decided, but in this case the LORDS inclined to the negative.

Fol. Dic. v. 1. p. 183. Stair, v. 1. p. 437.

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1674. June 16.

BROWN against INNERVEIK.

In a competition betwixt two base infeftments flowing from different authors, the Lords preferred that right which was in possession, tho' the right upon which the process was founded was of an older date, and refused to sustain the reduction without a progress from the King, or a common author, or prescription; for the defender argued, that he being in possession, and producing any infeftment as a title, cannot be affected but by a prior complete right.

ROBERT BROWN pursues a reduction of the right of a two merk and a half merk land, being a portion of Blackburn, against John Innerveik: In which pursuit, the pursuer produces a base infeftment from John Duns, in favours of William Wallace, of the said whole portion; *Item*, An infeftment in favours of James Wallace, as oye to William, and the pursuer's infeftment from James. The defender produces an infeftment from Chirnside of East-Nisbet to Innerveik, with a contract of division between Innerveik and John Wallace, son to William, bearing, 'That Chirnside had given right to either of them of the equal halves of the said tenement, and that Innerveik had right from Duns, the pursuer's author;' he produces likewise a discharge from Duns to Chirnside of the price of the said lands. Hereupon the pursuer repeated his reason of reduction, viz. 'That his right from Duns by progress began in anno 1575, and the defender's first right produced is but in anno 1603, from Chirnside;' so that both being but base rights, and the pursuer's long prior, it is preferable. The defender *alleged*, That the reason so conceived was not relevant, for he being in possession, and producing any infeftment as a title, it cannot be taken away but by a prior valid right; and so the pursuer must libel and instruct that Duns his author had right immediately or mediately from the King, the first fountain of right; or that the defender derives his right from Duns, as common author to both, and so cannot quarrel Duns' right; or that the pursuer or his author since the act of prescription had possessed by virtue of their rights 40 years without interruption. It was *answered* for the pursuer, That where the defender could allege none of these titles himself, it was sufficient for the pursuer that his right was equally good, and more ancient. *2do*, He instructs Duns

to be the common author, as being author to Chirnside by Duns' discharge, and by the contract of division. It was *replied*, That such acknowledgments of authors will not prejudice their singular successors, unless their infestments be produced, which can only show a progress from a common author; otherwise no singular successor could be secure against such acknowledgments or writs not contained in the investiture; and, as to the contract of division with John Wallace, it operates nothing, because the said John Wallace was never infest, but his son James Wallace was infest, as heir immediate to his good-sire.

THE LORDS found the reason of reduction not relevant upon the prior base infestment, without a progress from the King, or a common author, or prescription; and found the acknowledgment did not instruct a common author, without production of the progress of infestments; and that the contract of division was not effectual, unless that Wallace the son were instructed to have been infest, or that he is represented by this party, who thereby is obliged to fulfil his contract of division.

Fol. Dic. v. 1. p. 184. Stair, v. 2. p. 272.

1684. February 1.

ANDERSON *against* CRICHTON.

No 83.

In a competition of arrestments of rents, founded on the debts of different proprietors of the same tenement, the right of one of whom was reduced; found that the reduction took effect, only after decree, so that the arrester upon the debt of the defender in the reduction was preferred.

In the action for making arrested goods furthcoming, pursued by John Anderson against William Anderson's tenants, and the said William for his interest; it was *alleged* for one Crichton and other arresters, That he ought to be preferred, because his arrestment was prior to John Anderson's. It was *answered* for John Anderson, That he ought to be preferred, because his arrestment was founded upon a debt due by George Anderson, son to the said William, and that the said William was denuded by disposition of the tenement, whereof the mails and duties were now in controversy; and, that Crichton's arrestment was founded upon a debt of William the father, who had no right to the tenement, or mails and duties thereof. It was *answered* for Crichton, That he being anterior creditor to the father, had raised reduction of the son's right to the tenement *ex capite inhibitionis*; and upon the act of Parliament 1621, as being granted by the father to the son, without any onerous cause; and that he held the production satisfied, and repeated his reason, *ex capite inhibitionis*, against the son's right; which being reduced, the arrestment for the son's debt fell in consequence; and that the mails and duties being un-uplifted, and in the tenant's hands, ought to be decerned and made furthcoming to the said Crichton. It was *duplicated*, That although the son's disposition were reduced instantly, yet it could only take effect from the date of the decret; so that the creditor of the son, who had arrested, ought to be preferred to the mails and duties that were due before the decret of reduction. THE LORDS found, That the decret of reduction did only take effect from the present date thereof, and preferred the arrester upon the son's debt, to the mails and duties due before the decret of reduction, albeit they were extant in the tenant's hands un-uplifted.

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Thereafter it was *alleged*, That the inhibition was null, in respect the execution thereof did bear, that the same was execute at the common debtor's shop, by delivering a copy to his wife there, whereas all executions ought to be personally, or at the dwelling-house. THE LORDS sustained the objection against the inhibition, unless the inhibitor would offer to prove, that the shop was a part of the dwelling house.

Thereafter it was *alleged* for Anderson the arrester, That he had obtained a decret of adjudication of the tenement, whereof the mails and duties were craved ; and therefore ought to be preferred, not only since the decret of adjudication, but since the citation, which was the ground of the adjudication ; in regard the act of Parliament declares a citation upon a summons of adjudication, to be equivalent to a comprising, and infestment following thereupon ; and true it is, that a comprising, and infestment thereupon, would be preferable to Crichton's arrestment. THE LORDS preferred the adjudger, only since the decret of adjudication ; and found, That the act of Parliament, declaring citations of adjudications to be equivalent to a comprising and infestment, was only in a competition with voluntary rights, but did not prejudge legal diligences, such as arrestment.

President Falconer, No 77. p. 51.

1763. July 27.

STRACEY TILL and Others, *against* ROBERT, MARGARET, and WILLIAM JAMIESON.

No 84.

An assignation granted by a woman before, but not intimated till after, her marriage, found preferable to the legal assignation by the marriage.

JOHN HAMILTON, merchant in Glasgow, bequeathed to his niece Margaret Jamieson L. 200 Sterling, one moiety payable eighteen months after his own death, and the other at the first term after the death of his wife.

Mr. Hamilton having died upon the 1st of April 1759, Margaret Jamieson, by her assignation for love and favour, dated the 7th of June thereafter, conveyed the legacy above mentioned to Robert Jamieson her father ; but, with this proviso, that, in case of his predecease, the whole should return to herself in life-rent, and to William Jamieson, her brother, in fee, in the event of her having no children.

The said Margaret Jamieson was married, upon the 17th of August 1759, to Robert Mason linen-draper in Northallerton, who left her the same day ; and the first account that she got of him afterwards was, that he was a bankrupt, and imprisoned in York Castle.

Upon the 19th September 1759, a commission of bankruptcy issued against the said Robert Mason ; and, upon the 22d of October thereafter, he was declared a bankrupt by the major part of the commissioners, who, of that date,

executed an assignment of his effects to Stracey Till of Fen-Church Street, and others.

The assignation in favour of Robert Jamieson was not intimated till May 1760; and the executors of John Hamilton having brought a process of multiplepoinding, a competition arose between the assignees under the commission of bankruptcy, and the said Robert Jamieson.

Pleaded for the assignees under the commission of bankruptcy; The *jus mariti* vests in the husband the moveables belonging to the wife, without the necessity of intimation; the law considering the marriage as a sufficient notification of his right; and therefore, as in common cases, the second assignation, if first intimated, is preferred. There is no reason why the *jus mariti* should not give the same preference to the husband, in a competition with the wife's assignation, not intimated before marriage.

Answered for Robert Jamieson; Although, in a competition between two persons, each of whom had right by assignation from Margaret Jamieson, the first intimated would be preferable, the present case is extremely different: For, *imo*, The reasons which gave occasion to the introduction of intimations will not here apply. Intimations are not necessary, either to divest the cedent or to complete the right of the assignee, and were only introduced to guard against the granter's fraud, by uplifting the debt assigned, or by executing a second assignation, upon which payment might be received, to the prejudice of the first assignee. But here there can be no competition upon double rights; for, in fact, there is but one assignation, viz. that which was granted to Robert Jamieson; and as it is impossible to suppose, that, by her after marriage, Margaret Jamieson intended to convey to her husband what she had formerly granted to her father, so it will be absurd to suppose, that the law could mean to carry to the husband a right which no longer belonged to his wife. *Secundo*, The legal assignation by marriage is an universal right to the whole of the wife's moveables, subject to all her prior debts and deeds affecting these moveables; and as the assignation by Margaret Jamieson to her father bears warrandice from fact and deed, the husband, and those in his right, must be barred from pleading upon the *jus mariti*, in prejudice of the obligation which his wife, by that clause, came under to make good the assignation.

Replied; The wife, in this case, did not incur the warrandice. The contravention of warrandice from fact and deed implies some tortious act of the cedent, with an intention to defeat a prior obligation: But this can never be presumed from a party's entering into marriage; and, if latent assignations between conjunct persons should be available to frustrate the husband's legal right by the marriage, a door would thereby be opened to frauds, which it would be impossible to guard against.

'THE LORDS preferred Robert Jamieson, the father.'

Pleaded in a reclaiming bill, besides the points formerly insisted upon; that the creditors of the husband ought at any rate to be preferred for the rever-

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tionary right which was reserved to Margaret Jamieson and her children *nascituri*, by the assignation to her father, and which undoubtedly fell under the *jus mariti*.

Answered for Margaret Jamieson, and her brother William, their father being then dead; The proviso, that in case of Robert Jamieson's predeceasing his daughter, the subject assigned should return to her in liferent, and to her brother in fee, failing heirs of her own body, was no more than a substitution, and cannot be considered as a right subsisting in her person at the time of the marriage, so as to fall under the *jus mariti*.

THE LORDS adhered to their former interlocutor, in so far as it found the assignation in favour of Robert Jamieson preferable to the legal assignation by the subsequent marriage; but remitted it to the Lord Ordinary to hear parties upon the effect of the substitution contained in the said assignation to Robert Jamieson, and the claim of the husband's creditors founded thereon. See HUSBAND AND WIFE.

For the Assignees under the Commission of Bankruptcy, *Lockhart.*
Walter Stewart and Ferguson.

For the Jamiesons,

Clerk, *Home.*

A. W.

Fol. Dic. v. 3. p. 153. Fac. Col. No 117. p. 276.

1764. July 24.

THE REAL CREDITORS, *against* THE PERSONAL CREDITORS OF JOHN GILLESPIE.

No 85.

A person held lands by disposition and infeftment, which were afterwards reduced. While he possessed the lands he granted heritable bonds. After the reduction, his personal creditors insisted the heritable bonds were granted *a non habente potestatem*, and were not preferable. The heritable bonds were preferred.

UPON the 10th of September 1720, Mary Young, proprietor of the lands of Greenhill, with consent of Alexander Renton her husband, granted an heritable bond to John Gillespie, for infefting him in an annualrent corresponding to the principal sum of L. 333 : 6 : 8.

In 1721, the said Mary Young and her husband granted another security of the like nature to Gillespie, for infefting him in an annualrent corresponding to the principal sum of 2000 merks.

Upon these two bonds Gillespie was duly infeft.

In November 1723, Gillespie obtained an adjudication upon these two bonds against Mary Young and her husband, adjudging their several rights and interests in the hands of Greenhill, for the accumulated sum of L. 8906 : 6 : 8; but no charter or infeftment followed upon this adjudication.

Several other bonds were afterwards granted by Mary Young to Gillespie; and, upon the 15th of December 1732, her husband being then abroad, she sold the lands of Greenhill to him at the price of 19,600 merks, out of which he was allowed retention of 14,000 merks, as the amount of the debt due to him.

Gillespie was infeft upon the disposition of sale, and entered into possession; but Renton the husband, having returned to this country, he, in 1742, brought

a reduction of the sale in his wife's name, upon the head of facility, fraud, and lesion.

This process was carried on very slowly for some years.

During the dependence, Gillespie granted two heritable bonds over these lands of Greenhill, one upon the 28th of May 1746, to Andrew Waugh, for L. 400 Sterling; and another upon the 21st of February 1749, to James Fleming, for 4000 merks. Upon these bonds infestment followed.

Gillespie having likewise contracted sundry personal debts, he, in the year 1752, executed a trust-disposition of the lands of Greenhill to John Smith writer to the signet, for behoof of his creditors; and Mr Smith having been infest upon this disposition, the lands were exposed to sale by public roup, and purchased by James M'Harg at the price of 30,000 merks.

No procedure had taken place in Mary Young's process of reduction from the 2d of February 1748; but, in the year 1756, after her own and her husband's death, it was awakened by Mr Michael Menzies advocate, as trustee for her children; and a proof having been allowed, Mr Menzies prevailed, and, in June 1759, obtained an interlocutor, whereby the Court 'Found the reasons of reduction of fraud and circumvention relevant and proven; and therefore reduced the disposition granted by Mary Young to John Gillespie, and infestment following thereon; and decerned accordingly.'

Against this interlocutor, M'Harg the purchaser, and the Creditors of Gillespie, preferred a petition, in which it was strenuously insisted for the real creditors, That, as they had contracted with him upon the faith of the records, they ought not to be hurt by the antecedent fraud and circumvention used by Gillespie in procuring the disposition from Mary Young. But this petition was refused, and the Court adhered to their former interlocutor.

The sale to Gillespie being thus reduced, the sums due to him on his heritable bonds and adjudications were ascertained, by interlocutors of the Court, to amount, at Martinmas 1756, to L. 6758 : 7 : 6 Scots; upon which a debate ensued betwixt his heritable and personal creditors. The former insisted for a preference in virtue of their heritable bonds; the later contended, that, as Gillespie's disposition was totally reduced, the heritable bonds were granted *a non habente*, and all the creditors fell to be ranked *pari passu*.

Pleaded for the real creditors: *imo*, The disposition by Mary Young to Gillespie, though reduced at the instance of the trustee for her children, must still subsist as a security for the debts due to him out of the estate, and of consequence the infestments granted by him to his real creditors must afford them a preference. The only effect of the reduction, which proceeded upon the inequality of the bargain, was to give the former proprietor a preferable right to the lands, and to set aside the disposition so far as it interfered with that right. But it was not the intention either of the process or of the Court, to reduce the disposition any further than the pursuer's interest was concerned. With respect to every other person, the deed reduced must be considered as effectual. This

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takes place in reductions *ex capite inhibitionis*, or *ex capite lecti*, and even in reductions and improbations; and there is no distinction with respect to reductions upon the head of facility, lesion, and circumvention. On the contrary, the Court has, in such cases, been in the practice of reserving dispositions set aside upon these grounds as a security to the disponent for the sums which he had actually advanced. It was so determined in the case of Irvine of Cove, 19th July 1751. See PERSONAL AND REAL.

2do, The heritable bonds granted by Gillespie, and the infeftment following thereon, implied a conveyance of every right which stood in his person; for it is an established point, that a deed may be effectual to carry rights which are not specially mentioned in it, and the law does not so much regard the words and the form of the deed, as the purpose and intention of it. See Sheriff of Ti-viotdale against Elliot, *voce* IMPLIED ASSIGNATION; Beg against Beg, *IBIDEM*; Sinclair against Coupar, *voce* VIRTUAL; Muir against Fullarton, *IBIDEM*; Colonel Erskine against Hamilton, *voce* IMPLIED ASSIGNATION; New College of St Andrew's against Sir Alexander Anstruther's Creditors, *IBIDEM*.

Answered for the personal creditors: *imo*, It is unnecessary to enquire what judgment might have been pronounced, if Gillespie, or those in his right, had insisted for a reservation similar to that in the case of Irvine of Cove. It is sufficient that no such judgment was pronounced in the present case; and as, by the decree of the Court, the disposition to Gillespie, and the infeftment following thereon, 'were declared to have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, nor effect, and to make no faith in judgment, nor outwith the same in time coming;' so, upon the plainest principles of law, the rights communicated by him to his creditors must fall of consequence. Besides, though Gillespie had, during the pendency of the reduction, insisted that his right to the lands should be sustained as a security for the sums due to him, the Court would not have sustained it to that effect; for, in the *first* place, he had no interest to make the demand, being already fully secured by the former infeftments in his person; and, in the *next* place, as, long before the decree of reduction, he had conveyed his estate to a trustee for the behoof of his whole creditors, there was thereby a *jus quasitum* to every one of them; and therefore, whatever the Court might have done, if the question had been solely betwixt Gillespie himself and the pursuer of the reduction, it would not have interposed *ex nobili officio*, when persons having an interest could show that they might be hurt by such interposition; *lastly*, it is a material circumstance in this case, that none of the money now in question was advanced by Gillespie upon the faith of the right of property which he got from Mary Young; but was all advanced long before that period upon other securities. In questions of this kind, it makes a material difference, whether the party was, *ab ante*, creditor upon another account, or whether his *jus crediti* arises from money advanced upon the faith of the right brought under challenge.

In the last case, a defender may be entitled to insist to be put in *statu quo* by the pursuer's restoring to him whatever was advanced in consequence of the transaction; and, if he runs any risk of losing, the Court will, *ex æquitate*, give him relief by sustaining the deed challenged as a security for the money so advanced. But, where the money was not given upon the faith of the deed challenge, but was, *ab ante*, lent upon the faith of the party himself, or upon any other security, it ought to remain upon that security; and there is no ground in equity for giving any farther relief.

The case of a reduction *ex capite inhibitionis* does not apply; because such reduction, in its own nature, can go no further than to empower the creditor to affect the subject. When his debt is satisfied, the right of the disponee stands firm to all intents and purposes. In like manner, a decret of certification, in an improbation, which proceeds only upon a fiction of law, does, in its own nature, go no farther than to secure the interest of the pursuer; and it may therefore subsist in the person of the defender for any other purpose where the pursuer's interest is not affected. But, where a deed is actually improved upon a proof of the forgery, it never can stand in the person of the defender for any purpose whatever; nor can he found upon it even in a question with third parties, with whom the pursuer in the improbation has no concern.

As to the case of a reduction *ex capite lecti*, it tends to support the plea of the personal creditors; for, although such action can only be pursued by the heir, or those in his right, and so is not competent to the creditors of the defunct; yet, after the deed has been reduced by the heir, it will be competent to the creditors to take the benefit of it, and attach the subjects that fell under the disposition reduced; and, by the same rule, although the creditors of John Gillespie, could not have insisted in the reduction of Mary Young's disposition to Gillespie, yet, now that it is reduced, they certainly are entitled to avail themselves of it.

2do, The two heritable bonds granted by Gillespie cannot imply a conveyance of the infeftments of annualrent that stood in his person. It is certain, that Gillespie never intended to convey these infeftments to his creditors. He considered himself as absolute proprietor at the time, and in that character he granted to them the two heritable bonds in question. But, even though his intention had been ever so clear, it was not carried into execution *habili modo*. The infeftments which he gave to Messrs Waugh and Fleming can have no stronger effect than if he had infeft them expressly in an annualrent to be uplifted out of the annualrents that subsisted in his own person. Now, although Gillespie might have conveyed these annualrents to his creditors, to be holden either of himself or his superiors, yet, it is clear that an infeftment of annualrent in these infeftments of annualrent could vest nothing real. A full and absolute disposition, by which the disponent is totally denuded, may indeed imply a conveyance of every inferior right that was in his person; but it will not thence follow, that, where a person, in the character of proprietor, grants an inferior right out of the lands, such grant will imply a conveyance of every other infe-

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rior right in his person. If he has not denuded himself of these other rights *habili modo*, they will still remain with him, and may be afterwards conveyed by him, or carried off by legal diligence. See 18th March 1631, Laird of Clackmannan against Laird of Allardyce, *voce* IMPLIED ASSIGNATION.

The decisions founded on by the real creditors do not apply. In the case of the Sheriff of Tiviotdale, the right under which the party claimed was an absolute right of property, and was therefore justly found to comprehend a right of reversion. In the case of Beg, there was likewise an absolute right of liferent granted; and, in the case Sinclair against Coupar, an assignation to mails and duties in all time coming was very properly found to imply an obligation to grant a formal conveyance of the lands; because nothing else than a right of property could be meant or intended by it. The other cases proceeded entirely upon a mistaken idea, (which was understood to be the law, until it was corrected by the judgment of the Court in the case of Bell of Blackwoodhouse against Garthshore 1737, No 80. p. 2848. ;) that a simple conveyance was sufficient to denude the granter, if his right was only personal. None of these decisions, therefore, apply to the present case.

‘ THE LORDS preferred the real creditors.’

For the Real Creditors, *Johnston.*

For the Personal Creditors, *Wight et M^e Queen.*

A. W.

Fol. Dic. v. 3. p. 155. Fac. Col. No 141. p. 327.

No 86.

In a competition between the singular successor of a reverser, entitled to redeem upon an elusory presentation, and the heir of the nominal fiar; the singular successor preferred.

1783. January 22. EARL of LAUDERDALE against EARL of EGLINTON.

THE Earls of Lauderdale and Eglinton having both laid claim to the patronage of the parish church of Dundonald, their respective pretensions came to be tried in mutual processes of declarator.

The titles of both claimants were derived from one source, the family of Abercorn, but were thus differenced:

In 1742, John Earl of Lauderdale was *infeft* in his patronage, among other subjects contained in a charter under the Great Seal, purporting to have proceeded on a disposition, granted by James Earl of Abercorn; the charter and sasine, but not the disposition, were produced. It did not, however, appear that these subjects had ever, from that time downward, been transmitted by any of the posterior title-deeds of the family of Lauderdale; the present Earl having made up his title by adjudication on a trust-bond.

On the other hand, the Earl of Eglinton connected his title with that of the Earl of Angus, as dispoinee of James Earl of Abercorn. The Earl of Angus, indeed, did not obtain a charter of those subjects for eleven years subsequent to the date of that on which Lord Lauderdale's claim was founded; but then the right was regularly transmitted from him to Lord Eglinton, by an uninterrupted series of titles, extending through the whole intermediate period.

It is farther to be remarked, that in the register of reversions a copy of a bond of reversion was found, granted by John Earl of Lauderdale the day after the date of the disposition in his favour, obliging himself and his heirs, on receiving, at any time, payment of a double angel of gold, or 20 merks, to redispone the subjects to Lord Abercorn, his heirs and assignees.

With respect to the exercise of the patronage in question, the parties were more on an equality; the right of neither appearing to have been followed by any proper act of possession; although Lord Eglinton and his predecessors had all along possessed the other subjects which were conveyed to them together with the patronage.

The question, therefore, which occurred between these parties, and on which the Court ordered a hearing in presence, was, Whether, in these circumstances, the prior right of Lord Lauderdale, or the posterior one of Lord Eglinton, should, *in hoc statu* at least be preferred.

Pleaded for the Earl of Eglinton: It was merely a conveyance in trust, which the Earl of Abercorn executed in favour of John Earl of Lauderdale in 1642. Of the nature of this trust the bond of reversion granted by him is a full proof; the tenor of that obligation, as improbation is not proposed against it, being, by the extract produced, sufficiently ascertained, in terms of the statutes of 1469 and 1617.

Although therefore no direct evidence has been discovered to prove actual redemption, and even though it were supposed that none had taken place; yet it is thus manifest, that, notwithstanding the conveyance, the true or substantial right remained unimpaired with the disponent; whilst the right of Lord Lauderdale, subject to an unlimited power of revocation, consisted barely in a name. That reserved faculty, almost the only thing implied in the transaction, has been secured by the bond of reversion; and, if not likewise stipulated in the charter produced by Lord Lauderdale, it is because, at that period, powers of revocation were not deemed to be effectually retained in settlements or conveyances, by the insertion of any clause, however expressive of the intention. In the same manner as in the present instance, the faculty of redemption for an elusory sum was then ordinarily substituted in its place; a practice of which the tailzie of the estate of Kintore, recorded in July 1578, and the settlement of that of Gromarty, may be also mentioned as examples*. But the revocation of rights merely nominal being the object of that stipulation, it was by no means needful to follow out a formal and regular order of redemption; so that it is of no consequence to the present case, whether such occurred in it or not. Though strict feudal forms are doubtless to be observed, yet it is only when essential to rights, not when solely calculated for elusory purposes. Thus, in the case of Rosehall, a clause of redemption in an entail was, without the order having been used, found to be equivalent to a power of revocation*. On the same principle was the determination of the House of Lords in that of Forbes of Pitsligo,

No 86. 9th March 1756, *voce* FORFEITURE. And, in effect, a similar judgment was given by the Court of Session in the case of Cromarty, *voce* TAILZIE.

Still however this argument goes on a ground more favourable to the Earl of Lauderdale, than just; for it is not truly to be supposed that, in this case, the order of redemption was not actually accomplished. *Post tantum temporis*, the presumption of law is, for its due observance; since, to Lord Eglinton, the right in question, from the time it was *de facto* conveyed to the author of his predecessors, has descended through an unbroken course of succession, by titles on which, as to the other subjects of them at least, constant possession has followed; whilst no such transmission appears in favour of Lord Lauderdale, or his authors; and as little proof is there of the right of patronage having been exercised by any of them since 1649.

Answered for the Earl of Lauderdale; In regard to the actual exercise of this right of patronage, if Lord Lauderdale's authors have not enjoyed it, not more have those of Lord Eglinton; and therefore here parties will but stand on an equal footing. With respect to the constitution of the right, a difference appears in their situation; but it is in favour of the former. The extract produced is not equal to a principal bond of reversion. By the statute of 1469, indeed, such extracts were held as valid documents; but, in consequence of a posterior enactment in 1617, they can only bear faith 'when they are not offered to be 'improved;' which, as to that in question, is now ready to be done.

But supposing this extract to be probative, and the stipulation respecting redemption to have intervened, still however the right of reversion will not operate *ipso jure*. The conveyance in favour of Lord Lauderdale was undoubtedly in itself valid, and of consequence he and his successors were to remain vested in the feudal right, until it should be legally taken from them; which could only be done by the executing of the order of redemption, or by means of adjudication in implement. To say, that because in some cases such a distinction may exist, as that between substantial and nominal rights, no compliance with legal forms, nor any attention to them is requisite with regard to the latter, is a doctrine that were equally dangerous to the stability and order of the law, as it is in itself unsupported by any authority. No right, it will be owned, more purely nominal, can be imagined, than is the fictitious constitution of many freehold qualifications; yet not even that shadow of a right can be set aside *de plano*; but in order to restore the title of the party from whom it flows, he must pay obedience to all the legal forms.

It is true, that, for the reason stated on the other side, family settlements have sometimes been framed by means of deeds, which, though *ex facie* complete in themselves and unlimited, were yet subject to a separate obligation of reversion, to be effectuated by an elusory redemption. The law, however, is not to be influenced by the secret purposes, but by the overt acts of parties; and of course, after a conveyance has been made, the solemnity of reconveyance thus becomes indispensable. Those cases which have been referred to, give truly no counte-

nance to the opposite doctrine. The case of Kintore had not the sanction of any judgment of the Court; that of Rosehall was determined by the law of prescription; and, with respect to that of Pitsligo, it was the personal right of a father, who, together with his son, derived a title from a third party, which, by the House of Peers, was found to fall under his forfeiture; so as to occasion the reversal of the decision of the Court of Session. In the case of Cromarty, the second tailzie proceeded on the narrative, that the order of redemption had been used.

Indeed, were this argument, of the independence of substantial rights upon legal forms, of any solidity, why, it might be asked, on the other hand, cannot an apparent heir transmit, without any formality, the substantial right with which he is vested? No reason for it could then be assigned; for that he might, and other the like incongruities, would plainly be unavoidable consequences of a doctrine which has no foundation in law. Thus, it is evident, that however much a nominal right that of Lord Lauderdale's author may have been, a reconveyance nevertheless, or an order of redemption, was necessary for the reinstating of the disponent Lord Abercorn, or his successors; and therefore, as at this moment, Lord Lauderdale stands undivested of the patronage in question, he is, *in hoc statu*, at least, entitled to the legal exercise of that right.

Observed on the Bench: The extract of the bond of reversion not being challenged in a reduction-improbation, is for that reason to be accounted a good document; and even though it were challenged, it would still be not less effectual, because from the possession its tenor would be proved. The bond gives a power to alter; but because that is a personal faculty, does it follow, that by its not being exercised, the feudal right would become complete and unlimited in the disponent? No; for the true and substantial right remained with the disponent. On this principle judgment was pronounced with respect to the entail of the late Lord Lovat; a case omitted in the pleadings*. There it was argued, that the reservations in that deed being merely personal faculties, his son's right to the estate did not fall by his forfeiture; but it was found, that a nominal fee only existed in the son, while his father continued still vested in the substantial right, which was affectable by his debts and deeds, and of course by his forfeiture. In like manner, in the present case, the substantial fee in Lord Abercorn, (not so as to the nominal right of Lauderdale), was subject to his debts and deeds, and had he incurred forfeiture, would have fallen under it. It is for a similar reason that a *donatio inter virum et uxorem* is, though unrevoked, ineffectual against creditors, when there is a deficiency of funds. As, therefore, Lord Abercorn *de facto* conveyed away the estate, that was a sufficient extinction of the nominal fee. But indeed were it necessary *post tantum temporis*, the actual redemption should be presumed.—Even independently of these observations, the right of Lord Eglington being continued down to the present time, by a regular series of titles, and clothed with possession, is to be esteemed preferable to that of Lord Lauderdale, on which not only no possession has follow-

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ed, but which has not even been transmitted to him through any part of the period intervening from its origin till now. Its antiquity, in these circumstances, is unfavourable to his claim; and until the warrants be produced of his charter and infeftment, these last are to be deemed absolutely of no avail.

The majority of the Court however seemed to disapprove the idea of a charter and sasine, though of an old date, being unavailing from the want of possession.

Some of the Judges did not admit the presumption of redemption *post tantum temporis*, and objected to the effect allowed to the distinction between real and nominal rights; observing, that though there was good ground for disregarding in future the nominal right of Lord Lauderdale, yet as long as he was not divested of it, he was entitled to its effect; for so long the right of Lord Eglinton, though redeemable, was not in fact redeemed; and its redemption ought not to have a retrospect.

But the COURT in general adopted the presumption, and therefore,

THE LORD ORDINARY having 'assolizied from the conclusions of declarator at Lord Eglinton's instance; and preferred Lord Lauderdale to the patronage in question;'

THE LORDS 'altered that judgment, and found the right of Lord Eglinton to be preferable.'

Lord Ordinary, Hailes.

For the Earl of Eglinton, Wight, J. Boswell.

For the Earl of Lauderdale, Hay Campbell.

Clerk, Home.

Fol. Dic. v. 3. p. 156. Fac. Col. No 80. p. 124.

1783. February 5.

JOHN and HUGH PARKERS, against DOUGLAS, HERON, and Company.

No 87.

Dispones in security found preferable to the disponent's personal creditors, who had executed a poinding of unripe crops, in the natural possession of the disponent.

In 1774, James Campbell being debtor to Douglas, Heron, and Company to a large amount, by a deed, containing procuratory of resignation and precept of seisin, and on which infeftment followed, 'sold, alienated, and disposed his lands of Adamhill, &c. in security to them,' redeemable upon payment of the principal sums and annualrents. The deed farther contained an assignation to the rents and profits, with a power to take the subjects into their own possession, to grant leases, to appoint factors without being liable but for their own intromissions, and to sell the lands by public auction.

A considerable part of the lands was allowed to remain in the debtor's natural possession; and on the 31st of May 1780, Messrs Parkers, creditors to him by bill of exchange, executed a poinding of the growing crops. In August following, before they had completed their diligence by cutting down and ingathering, the Sheriff of the county, upon the application of Douglas, Heron, and Company, awarded a sequestration over the lands, in security of the current annualrents due to that Company.

This judgment was brought under the review of the Court of Session, by a bill of advocacy, at the suit of Messrs Parkers, who likewise brought an action of declarator, for having it found, that they had right to the subjects in the hands of the sequestrators.

Pleaded in defence for Douglas, Heron, and Company: The infeftment in favour of the defenders effected a complete transference of the debtor's estate, defeasible only upon full payment of the debt and annualrents. Hence they are entitled to every benefit which would have been competent to a purchaser; and as no arrestment used in the hands of the tenants, by a creditor of the disponent, could have affected their interests; so, as to lands in the disponent's natural possession, to the effect at least of drawing a full rent, they must be in the same situation as if they had granted a lease to him.

Even in the character of creditors heritably secured, the defenders preference must be unquestionable. Although the statute 1469, § 36. has provided, That in the action of poinding the ground, the goods of tenants should only be attached for their landlord's debts to the extent of the rents due by them; yet the creditor is still entitled, to the exclusion of all others, to attach without limitation every species of moveables which are the property of the debtor, and found on his lands.

This privilege, which is of the same endurance with the debtor's right of property, requires not for its constitution the intervention of any action. As a landlord has a property in the fruits till his rent is paid; so to the extent of his debt, the creditor, by his right of security, has these impledged to him. He cannot indeed, like the landlord, recover those which have been sold, or evicted by the complete diligence of other creditors; but so long as the property remains in the debtor, he is entitled to assert his preference, without actual execution by poinding the ground, which is only necessary to operate payment when not voluntarily made. Hence rents being arrested for a personal debt, a creditor infeft appearing in the furthcoming will, without any poinding, be preferred; *Lady Kelhead* against *Wallace, &c.* No 30. p. 2785.; *Webster contra Hay Donaldson, infra b. t.* And hence, in a competition between two annualrenters, the Court found the first annualrenter pursuing a poinding of the ground, preferable to a second annualrenter in possession; *Clerkington* against *Clerkington, voce* POSSESSORY JUDGMENT. Upon the same principles, when a personal creditor is proceeding to poind, one heritably secured producing his interest at any period before the complete execution of that diligence will be preferred for the annualrents already due; by sequestration, he may secure those which are still current; A contrary doctrine, by abolishing his preference in subjects in the debtor's possession, would exceedingly impair his security.

Farther, The infeftment on record being equivalent to an intimation of the assignment in favour of the defenders, of the rents and profits of this estate, *Webster contra Donaldson, sup. cit.* it must be preferable to every subsequent diligence used for attaching the produce.

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Answered: There are in the law of Scotland only two sorts of debts which create a preference on the fruits of land; the rents due to a proprietor, secured by the hypothec, and *debita fundi*, which are made effectual by an action of poinding the ground. In the character of purchasers under redemption, therefore, the defenders are entitled to no privilege. As they have stipulated no rent, they have no right of hypothec; and being proprietors, the action of poinding the ground is altogether incompetent; Erskine, book 4. tit. 1. § 11. Gartland *contra* Lord Jedburgh, *voce* LEGAL DILIGENCE. On this footing the debtor must be understood to have possessed on a *precarious tolerance*; Stair, book 1. tit. 11. § 10.: And although perhaps liable, on principles of equity, to the defenders in a recompence for the use of their subject, he must be proprietor of the produce to every effect, either of voluntary or legal alienation.

But the defender's infestment, however conceived in terms appearing to denote a transference of the property, imports no more than an incumbrance or security, which, in its nature and effects, is essentially different. In a right of property, whether the deed of conveyance be unconditional, or qualified with clauses of reversion, the disponent is completely denuded; and the powers inherent in property, of possessing the lands, letting them to tenants, uplifting the rents, and the rights of electing members of Parliament, &c. can be exercised by the disponent alone. In securities again, whether constituted in the form of an infestment of annualrent, where, without any security for the sum lent, the lands are burdened with a certain yearly duty; of an heritable bond where the real right is accessory to the personal obligation; or of a disposition in security, such as occurs in the present instance, matters are in a situation totally different. In these, though some of the powers already noticed may, for the conveniency of creditors, be superadded by express provision, the right created by the infestment over the lands themselves is no more than a pledge, analogous to the *hypotheca* known in the Roman law, which is perfectly compatible with the radical right remaining in the debtor, and with the exercise by him of every faculty attending on property. Hence in a late question between Taylor of Southfodd, and his Creditors, the LORDS found, that an infestment in security did not entitle the creditors to pursue a removing against the debtor: *See* REMOVING. And hence, though rights of property cannot be lost by the negative prescription, heritable securities of every denomination may be extinguished in that manner; March 3. 1758, Naismith *contra* Anderson. *See* PRESCRIPTION.

With regard to the fruits of lands affected by securities of this sort, they remain the property of the debtor, and subject to his debts and deeds, till the creditor, by the action of poinding the ground, or some other diligence, has appropriated them to himself. Indeed, it appears, that by the ancient practice, no preference whatever was created in favour of the incumbrancer over other creditors. Thus a creditor, in consequence of a prior arrestment of rents, was preferred to an appriser; Gray *contra* Tenants, No 1. p. 565. And although, in the competitions of the Creditors of Kelhead and Saintford,

this rule seems to have been departed from in the case of arrestments, because that diligence is not productive of any real *lien*; no argument can, with propriety, be adduced from thence with regard to poindings, by which a transference of property is effected; February 15. 1707, Lady Mary Bruce *contra* Cochrane of Ochiltree. See RIGHT IN SECURITY.

The introduction of a preference of this sort would be the source of much fraud and undue advantage among creditors. By withholding it till diligence be used by another creditor, in the manner here practised, the heritable creditor might for ever maintain a bankrupt in the possession of his most valuable moveable effects. An opportunity is thus offered to him of preferring one creditor to another, as whim or interest shall direct. And as personal creditors, though apprised, by the records, of the constitution of the security, must be altogether ignorant of its extinction by payment or intromission, it is in the power of the heritable creditor to thwart their diligence after his debt has been completely satisfied. From motives of expediency, therefore, the heritable creditor, in order to entitle him to any preference, ought to be obliged, either by letting the lands to tenants, or by himself assuming the possession, to acquaint the public of the debtor's real situation. In the first case, in virtue of the assignation to the mails and duties, and the consequential powers for making these effectual, he may enjoy, without any inconveniency to himself, the right of hypothec competent to the proprietor. In the other, the produce will undoubtedly belong to him.

With respect to the assignation to the *rents and profits*, that relates solely to the rents and casualties due by tenants, and cannot, with any propriety, be extended to crops raised by the debtor.

The question here agitated, was thought to be attended with considerable difficulty. By one interlocutor, the COURT, moved with the particular terms of the defender's right, and the apparent inconvenience arising from an arbitrary exertion of a preference of this nature, decided in favour of the personal creditor. But their ultimate judgment, resting on the consideration of the defender's right as an ordinary heritable security, and the pursuer's diligence as incomplete when the sequestration was awarded, was in favour of the creditors infert.

THE LORDS assoilzied Douglas, Heron and Company, from the conclusions of the summons of declarator, and preferred them to the sums in the hands of the sequestrators.

Lord Ordinary, *Westball*.
Clerk, *Homi*.

Act. *MacLaurin, Rolland*.

Alt. *Wight, Ilay Campbell*.

Fol. Dic. v. 3. p. 155. Fac. Col. No 89. p. 135.

S E C T. XV.

Annualrenters ;—Adjudgers ;—Inhibitors ;—Assignees, &c.

1665. November 11.

TELFER against JAMIESON.

No 88.

It was decided, that when a bond is given blank in the creditor's name, an arrester should be preferred to any other person whose name should be filled up in the bond, unless intimated to the debtor before the arrestment.

PATRICK TELFER being cautioner to Samuel Veitch, and having arrested in the hands of Marjory Jamieson a certain sum due by her to the said Samuel, pursues for making forthcoming ; and, having referred the verity thereof to her oath, the same was circumduced against her. The decret being suspended, and she reponed, she depones, That in January 1663, she granted a bond to the said Samuel, blank in the creditor's name, containing the sum of 2066 merks principal, with annualrents and expenses, and that the most part thereof, the said bond, was resting ; and also deponed, that she never heard, by intimation, or otherwise, before the arrestment, or since, that there was any name filled up in the same ; or that the sums therein contained belonged to any other person but the said Samuel ; excepting only, that in May or June last, which was both after the arrestment and decret following thereupon, Marion Geddes, whose name is now filled up in the bond, did serve inhibition against her thereupon ; likewise, the said Marion appeared and produced the extract of the foresaid bond, bearing date of registration prior to the arrestment, and craved to be preferred to the said Patrick. That being a matter of great importance as to blank bonds, and falling out daily, and never hitherto decided ; the Lords were the more exact in it, and after a very great debate, found that the arrester ought to be preferred, and they did prefer him ; and declared, that in all time coming, they would so decide, that when a bond was given blank in the creditor's name, the arrester should be preferred to any other person whose name should be filled up in the bond, unless the same filling up were intimate to the debtor before the arrestment. This is the first time that ever this was debated, *et bene judicatum*.

Newbryth, MS. p. 39.

No 89.

Two decrees of forthcoming being pronounced in the same day ; the one arrestment being laid a day sooner than the other, was preferred.

1666. February 1.

COLONEL CUNINGHAME against LYL.

IN a competition between Colonel Cuninghame and Lyll, both being arresters, and having obtained decreets, to make forthcoming in one day ; and Colonel Cuninghame's arrestment being a day prior ; he *alleged* he ought to be preferred, because his diligence was anterior, and his decret behoved to be drawn back to his arrestment. It was *answered* for Lyll, That it was only the decret to

make furthcoming, that constitute the right; and the arrestment was but a judicial prohibition, hindering the debtor to dispose, like an inhibition; or a denunciation of lands to be appraised, and that the last denunciation, and first appraising would be preferred: So the decret to make furthcoming is the judicial assignation of the debt, and both being in one day, ought to come in together. It was *answered*, That in legal diligences, *prior tempore est potior jure*, and the decret to make furthcoming is declaratory, finding the sum arrested to belong to the arrester, by virtue of the arrestment; and, as for the instance of appraisings, the first denunciation can never be postponed, unless the diligence be defective; for, if the first denouncer take as few days to the time of the appraising as the other, he will still be preferred.

THE LORDS preferred the first arrester, being equal in diligence with the second. See ARRESTMENT.

Stair, v. 1. p. 345.

No 89.

1674. February 10. BLYTH against The CREDITORS of DAIRSAI.

IN a competition among the creditors of Sir George Morison of Dairsay, Mr Henry Blyth having right to a sum, whereupon inhibition was used against Sir John Spottiswood of Dairsay, before he disposed the estate to Sir George Morison, did thereupon pursue reduction of two appraisings led against Sir John Spottiswood, whereunto Sir George Morison had taken right for his better security, when he bought the lands, and satisfied them with a part of the price, and obliged himself to make no other use thereof, but for his security. The reason of reduction was, because the sums whereupon the appraisings proceeded, were contracted after the inhibition. It was *answered*, That in both the appraisings there were sums anterior to the inhibition, and some posterior. It was *replied*, That the sums anterior were satisfied by the appriser's intromission within the legal, viz. 'either within the first seven years, or within the time by which the 'legals of appraisings not expired anno 1652, were prorogate for three years.' It was *duplied*, *imo*, That it was not relevant to allege, that the whole intromission should be ascribed to the sums anterior to the inhibition, but behoved to be ascribed to the whole sums *pro rata*; not only as to the sums in one appraising, but both the appraisings being acquired at one time for the buyer's security, the intromission behoved to be ascribed to both; and, albeit there be a prorogation of the legal, giving three years to debtors to redeem; it bears nothing of intromission *medio tempore*, much less can it extend to intromission had, after the legal was expired, according to the law then standing, and before the act of Parliament prorogating the legal; during which time, the appriser did not possess for satisfaction, but *proprio jure suo*, and so as *bonæ fidei* possessor, *fecit fructus consumptos suos*.

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No 90.

In a competition of appraisings, the sums upon which one appraising proceeded, were contracted partly before and partly after inhibition. It was argued, that the sums anterior were satisfied by intromission within the legal.—Found that intromission was to be ascribed to the first appraising, which alone carried the property; and this not with regard only to the sums anterior to the inhibition.

No 90.

THE LORDS found that the intromission was to be ascribed to the first apprising, which alone carried the right of property, and not to the sums only anterior to the inhibition: So that the whole apprising behoved to be satisfied within the legal; and if it were so satisfied, the property did accresce to the second apprising, in which there were some sums prior, and some posterior to the inhibition; to all which *pro rata* the posterior intromission was to be ascribed; but, if the saids apprisings were not found satisfied within their legals, the LORDS reserved to their consideration, whether the apprisings, as founded upon the anterior sums, should carry the right of the whole estate, or only a proportional part of the estate effeiring to the sums anterior to the inhibition, and that the inhibition should reach the rest of the estate, as reducing the sums posterior; but the LORDS found, that the intromission at any time before the end of the three years of the prorogation, was to be imputed in satisfaction: See INHIBITION.

Stair, v. 2. p. 263.

1676. December 20.

VEITCH against PALLAT.

No 91.

A rebel might assign after rebellion, the assignee proving, in competition with the donatar, that the debt for which the assignation was obtained, was contracted before rebellion.

JAMES SANDERSON being debtor to Nairn, and being denounced, David Roger took the gift of his escheat, anno 1648. In anno 1650, Sanderson grants a bond to James Brown, bearing expressly, 'to be for wines sent by James Brown from France in anno 1649.' Sanderson assigns James Brown to a sum due to him by Sir Robert Stuart in Ireland, in satisfaction of the foresaid bond, and therefore, in anno 1662, he granted a new assignation, whereupon Sir George Maxwell retired Stuart's bond, and granted a new bond; thereafter, William Veitch being a creditor of Sanderson's, obtains assignation to David Roger's gift, and took a new gift of the escheat of Sanderson in anno 1673. Peter Pallat, merchant in Bourdeaux, being donatar to the escheat of James Brown, there falls a competition between William Veitch, as assignee to David Roger's gift of Sanderson's escheat, and Peter Pallat as executor to Brown, both claiming right to that sum due by Sir George Maxwell. It was *alleged* for Veitch, That he ought to be preferred to the sum contained in Sir George Maxwell's bond granted to Brown, because that bond was granted in place of a former bond due by Sir Robert Stuart to Sanderson the common debtor, in anno 1638, which fell under Sanderson's escheat, and therewith also the new bond in place of it, and therefore any assignation granted by Sanderson to Brown, whereupon Sir George Maxwell's bond was granted, was null, and could not affect the moveables and escheat of Sanderson which befell to the King by his rebellion. It was *answered*, That by the interlocutor in this case, the 10th of December 1673, it was found, That an assignation granted after rebellion, for a debt due before rebellion, attaining payment or new security, by innovation of the former security before any gift declared, did secure the

creditor against the donatar, who could never repeat payment so made to a creditor. *Ita est*, The rebel Sanderson gave bond to Robert Brown shortly after the rebellion, bearing expressly, 'to be for wines sent from France,' and that before the rebellion, which is offered to be proven by Brown's compt-books, bills of loading, and other evidences and witnesses. It was *answered* for Veitch, That Pallat cannot subsume in the terms of the interlocutor, *imo*, because the rebel's bond granted to Brown, is after he was denounced; and though it bear, *for wines*, the narrative of a rebel's bond can never prove against the King nor his donatar; and the greatest length that ever the Lords have gone to burden escheats, is for the rebel's debts before rebellion, doing diligence, or obtaining satisfaction before a donatar's gift declared, for thereby the right is established in a private person, and is no more the King's right; but, if it shall be yet further extended to debts anterior to the rebellion, to be proven by witnesses, it may wholly evacuate the King's interest. *2do*, The rebel's assignation to Brown is after declarator of David Roger's gift.—It was *replied* for Pallat, That the favour of commerce requires, and hath introduced a fixed custom, that creditors getting actual payment at any time before the special declarator, are secure; the reason whereof is as effectual for bonds granted after rebellion, and payment gotten after declarator, as before, otherwise no commerce can proceed, by taking bond or assignation for any goods or ware, without inspection of the register, to see whether the buyer was denounced before or not. *2do*, Brown's assignation was for a debt anterior, viz. for wines sent from France; and, albeit it be after general declarator of Roger's gift, that is not relevant, because, by the act of Parliament 1592, it is declared, that wherever the rebel, his wife or bairns, are suffered to continue in possession of his goods, lands, rooms, and tacks, the gift shall be repute simulate, and to the behoof of the rebel; and, it is offered to be proven, that Roger's gift is simulate, and that Sanderson the rebel was suffered to continue in possession of certain tenements and acres in and about Lauder, and of his whole moveable goods and gear, albeit he had a sum of L. 2000 Sterling due to him by Sir Robert Stuart. It was *duplied*, *imo*, That this presumption of simulation can take no place, unless the rebel had a visible and considerable moveable estate that could be affected, and that the donatar had done no diligence; for donatars being comptable by their back-bonds to the rebel's creditors, they are not liable to do diligence; and therefore, if they recover their own debt, and the debt of the ^{thorning}horning, and the expense of the gift, though they proceed no further against the rebel, it infers no presumption that the gift was to his behoof. *2do*, Simulation being a kind of fraud, it is not relevant against singular successors, for causes onerous, as is clear by the act of Parliament 1621. But here Veitch hath taken assignation to the gift of the rebel's escheat, for satisfying of a debt due to him by the rebel, and is not partaker of the donatar's fraud or collusion. It was *triplied*, That whatever might be pretended in the case of an assignee by a donatar recently after the gift; yet, in this case, Brown the creditor had gotten payment before Veitch's

No 91. assignation, and therefore he can only *uti jure auctoris*; but if the donatar were competing, it were beyond question that he would be excluded, and the gift found simulate to the rebel's behoof.

THE LORDS adhered to their former interlocutor, but found that the rebel's bond granted after rebellion was still to be presumed simulate; being without sums received to that effect, that the rebel might burden the gift, and dispose upon the money, being moveable; which because of commerce would be effectual, even after rebellion; and therefore found that an assignee behoved to instruct his debt to be prior to the rebellion, and satisfaction prior to the general declarator; but found, that the bond granted by the rebel to Brown, bearing 'to be for wines,' though it mention not the time when they were sent from France, yet seeing the date was shortly after denunciation, they found it probable by writ, the merchant's compt-books, bills of loading, and witnesses, 'that there were wines truly loaded in France by Brown upon Sanderson's account, set down in Brown's books effeiring to this sum, and that prior to the denunciation,' and found the allegiance of simulation relevant; that the rebel had a considerable and conspicuous estate, unless it were instructed that the donatar had done some diligence to affect the same; and that Veitch's assignation being posterior to Brown's payment, he was in no better case than the donatar.

Stair, v. 2. p. 482.

1697. December 9. MILN of Carriden *against* CREDITORS of NICOLSON.

No 92.

THERE being a set of adjudgers ranked *pari passu*, some of them struck at by inhibition; yet it was found that the inhibition could have no effect, in respect the other adjudications were more than sufficient to exhaust the subject; with whom the inhibitor, who had not adjudged, could not come in *pari passu*, though he should adjudge; it being more than year and day since the first effectual adjudication; and therefore he could have no interest to reduce, seeing he could make no benefit by his reduction. See No 136. p. 1046.

Fol. Dic. v. 1. p. 184.

* * * See This case *versus* INHIBITION.

1707. November 27.

CAPTAIN FRANCIS CHARTERIS and MR PATRICK MIDDLETON *against* SIR ROBERT SINCLAIR of Stevenstown.

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In a competition between assignations

THIS was a competition about the Lady Dalhousie's liferent annuity. Charteris and Middleton, as creditors to my Lord Bellenden, her second husband, had

Formal assignations thereto, duly intimated. Sir Robert Sinclair produced a bond granted to him by the Lord Ballantyne and Earl of Dalhousie, containing a corroboration of an assignation to my Lady's jointure; it was *objected* against this by the other creditors, that they believed to be preferred, because his assignation was not intimated, and theirs were. *Answered*, It needed no other intimation but Dalhousie's signing the bond; for, to whom were they obliged to intimate it, except to him? and that was sufficiently supplied by his being obligant in the bond and assignation. *Answered*, Private knowledge is not equivalent to an assignation, but it must be a legal one, which can only be by a notary and instrument, that being an essential solemnity to complete assignations, as was found, Durie, p. 128. 15th June 1624, Adamson against M'Mitchell, No 61. p. 859. *2do*, Though the assignation be *in eodem corpore* with the bond, yet Dalhousie was not concerned in the assigning part; that belonged to Ballantyne to look to, and therefore it is to be presumed he regarded only the bond, and not the assignation, as was found in a parallel case, the last of November 1622, Sir John Murray *contra* Durham, No 56. p. 855. *3tio* Dalhousie was not the sole party to whom it should have been intimated, but the tenants who pay it, were also concerned, as Stair insinuates, tit. ASSIGNATIONS, § 8. *Duplied*, Legal knowledge of an assignation may be sundry ways inferred, besides an intimation; such as, by writing a missive letter, or paying a year's annualrent; and the subscribing of an assignation is as strong as any of these cases. *2do*, Though a witness is not bound to know the contents of a writ, yet a party obligant is bound to know what he subscribes. THE LORDS preferred Sir Robert Sinclair, and found there was no necessity of any other intimation, except Dalhousie's subscribing the writ, which sufficiently supplied it. See ASSIGNATION. *Fountainball, v. 2. p. 397.*

1709. January 11.

Competition between SIR ALEXANDER COCKBURN of Langton's CREDITORS.

In the ranking of Sir Alexander Cockburn of Langton's Creditors, a competition arose betwixt three sorts of creditors. Some had inhibited and adjudged; others had adjudged, but for debts prior to the inhibition; a third class had got voluntary rights and infestments of annualrent, but posterior to the inhibitions. The inhibitors raise a reduction of the annualrenter's rights, and obtain a decret. The annualrents being thus removed out of the way, the simple adjudgers being within year and day of the inhibiting adjudgers, crave to come in *pari passu* with them, in virtue of the 62d act 1661 between debtor and creditor, making them all joint proprietors, as if they had been all contained in one apprising; and in the division to affect the subject effeiring to their sums, as if the annualrents had never been granted. Against which the inhibitors con-

No 93.

and a bond containing a corroboration of an assignation, the bond, being prior, was preferred, as the debtor subscribed it; which was considered to be equivalent to intimation.

No 94.

A competition between three sorts of creditors, inhibitors, adjudgers, and voluntary dispoonees. See short account of the case in the synopsis.

No 94.

tended, this was both unequal and unjust; for the annualrenters were clearly preferable to you, the simple adjudgers, and would have excluded you to the end of the world; and if I have removed them by my negative and prohibitory diligence of inhibition, you can reap no benefit by my diligence, but I must come in to these annualrenters' place, and draw the share that belonged to them; and for what remains of the estate, the annualrenters will affect the same before the simple adjudgers get any thing; for *si vinco vincentem te, tunc te vinco*; and if I debar the annualrenters, who debarred you, then *multo magis* I debar you. By the first scheme, the simple adjudgers may draw something; by the last, they may be totally secluded, and get nothing. In the ranking of the creditors of Nicolson in 1697, in Miln of Carriden's case, No 92. p. 2876., the simple adjudgers came in with the adjudgers inhibitors; but in the ranking of Sir James Cockburn's creditors on the price of Dunse, the inhibitors were found to have right to the annualrenter's share, ay, till the debt contained in the inhibition be paid, but did not extend it to the accumulations in the adjudication.* And it was urged, that unless an inhibition had this effect, it would be altogether elusory, and make the adjudgers who had neglected that step of diligence almost as good as the inhibitor. See this standard laid down by Stair, *lib. 4. tit. 35.* And parallel cases were cited out of Huber, *ad tit. qui pot. in pign.* and *Sande decis. frisia lib. 3. tit. 12. def. 6.* THE LORDS thought it of great importance for the readier expedition of rankings to fix the standard, and, without varying, to make it a rule *pro futuro*; and therefore some of the Lords proposed to have some days to think better on it, which was yielded to.

January 20. 1709.—THE competition of the Creditors of Langton, mentioned January 11th, was decided, and the vote being stated, whether the creditor-inhibitor, who had likewise adjudged, was only to be preferred, in so far as he would have been, in case no posterior annualrents had intervened; or if he, upon reducing the infestments of annualrent, the ground whereof is posterior to his inhibition, must come in his place, and have the full sum contained in his inhibition made up to him? It carried, that he should only draw a share, in so far as the annualrenter prejudged him, and as if the annualrent had never existed, but to have his full sum. The Beneb, consisting of thirteen, it splitted six against six, so it carried by the Lord President's vote. It was started, that the LORDS might determine, if the annualrenter might not recur and carry away the simple adjudgers' share till he was paid, they being posterior to him, though he was forced to yield his place to the inhibitor-adjudger; but this not being fully pleaded was not decided at this time. See ASSIGNATION.—INHIBITION.

Fol. Dic. v. 1. p. 184. Fountainball, v. 2. p. 479. & 482.

* * * Forbes reports the same case:

SEVERAL of Archibald Cockburn of Langtoun's Creditors having procured infestments of annualrent upon his estate, all the rest did thereafter adjudge with-

* See INHIBITION.

in year and day of one another; some of which adjudgers had used inhibition against the common debtor, before his granting the infeftments of annualrent; and some had not inhibited, but their debts were contracted before the others' inhibitions. In the ranking of these creditors, it was *alleged* for the inhibiting adjudgers; That they by their inhibitions being in a case to reduce, and clear the estate of the posterior annualrents, should, by virtue of their adjudications, come in place of the excluded annualrenters, and draw full payment of the sum for which they did inhibit; notwithstanding that in a competition with the simple adjudgers, they could not obtain full payment, had there been no posterior annualrenter, but these simple adjudgers would have come in *pari passu*; v. g. Supposing the common debtor's estate to be 12,000 merks, affected by adjudications at the instance of three creditors for 5000 merks each, after the granting an infeftment of annualrent effeiring to 6000, in favour of another creditor; one of which adjudgers had inhibited the common debtor, before the date of the infeftment of annualrent; the rule of division is, the annualrenter first draws his 6000 merks, but then the inhibitor removes the annualrenter, and saves his whole 5000 merks; and so has 1000 merks more as his third part of the 12,000 merks: Thereafter the annualrenter recurs upon the simple adjudgers, and draws his 6000 merks, leaving them only 1000 merks betwixt them; for though inhibition is no positive, it is not simply a prohibitory diligence, but also it is preparatory, and operates fully in behalf of the user for security of his debt, *ut nihil illi desit*; and he, *qui sibi vigilavit*, by using inhibition, should reap the sole benefit of it; so that the inhibitors may justly allege against the co-adjudger's *vinco vincentem*, viz: the annualrenters, *ergo multo magis vinco te* the simple adjudger, excluded by the annualrenter without recourse; seeing the brocard *vinco vincentem* takes always effect except when it runs in a circle of creditors supplanting one another; and though the inhibition cuts off the annualrents, in so far as they prejudice the inhibitor, these are good rights against the simple adjudgers affecting *unamquamque glebam* of the remainder of the estate; seeing the simple adjudger hath nothing common with the inhibitor, but what remains of the estate after deduction of the preferable annualrent, which is as real a diminution thereof, as if it were a partial right of property or wadset; whereas an inhibiting adjudger is bound to acknowledge neither annualrent nor reversion; yea, he would even remove an annualrent, exhausting the whole estate, though the simple adjudger in such a case would get nothing, as having nothing to affect by his adjudication. Again, if the simple adjudgers, cut off by the annualrenters, were brought in *pari passu* with the inhibiting adjudgers who removed these annualrenters, in the case of simple adjudications to the value of the estate, those whom the annualrenters, had it not been for the others' inhibitions, would have quite excluded, would reap by the inhibitor's diligence equal benefit as themselves, which is absurd. But, on the contrary, to clear that the simple adjudgers can have no benefit by the inhibitions; if an infeftment of annualrent were granted after one of four or five

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adjudgers had inhibited, before the rest adjudged; when these adjudgers have divided and exhausted the estate with the burden of the annualrent, the inhibitor may come after the year and day and adjudge; and then, by reducing the annualrent, may carry the whole value of it without any regard or relief to the prior adjudgers; besides, inhibition is a legal diligence, securing the inhibitor against all posterior voluntary deeds of the inhibited debtor, till the inhibition be satisfied by payment.

Answered for the annualrenters and simple adjudgers; No inhibiting adjudger can receive advantage, more than he can have loss by the contracting of debts after the inhibition; nor doth the security or diligence of the posterior creditors accrue to him, as come in their place; but seeing the simple adjudgers' debts were contracted before the inhibitions, and their adjudications, by the act of Parliament 1661, come in *pari passu* with those led by the inhibitors, the latter have no further benefit by the inhibitions, than to draw their shares of that proportion of the common burden of the annualrents, that otherwise would affect them, as if these annualrents were not in being; v. g. An estate worth L. 6000, being to be divided betwixt two adjudgers, whereof each is creditor in L. 4000, and an annualrent corresponding to the like sum, anterior to the adjudications, but posterior to an inhibition used by one of the adjudgers; the annualrenter gets L. 2000, the simple adjudger L. 1000, and the inhibiting adjudger L. 3000; because, the L. 4000 of annualrent left but L. 2000 of the estate free to both the adjudgers, L. 1000 to each; whereby the inhibitor wanted L. 2000 of what he should have got, had there been no annualrenter in competition; which, therefore, is made up to him out of the annualrenter's share. This was made the rule of ranking *anno* 1692; hath been ever since observed, except in the single case of the Creditors of Dunse,* which resolved in a consent; and was confirmed *in foro contradictorio*, *anno* 1697, in the case of Carriden against the Creditors of Nicolson, *Nog2. p. 2876.*; so that being established by authority *rerum perpetuo similiter judicatarum*, for a matter of 18 years, (except in a singular instance,) it is turned into a customary law, *L. 34. L. 38. ff. de Legibus, L. 1. C. Quæ sit longa consuetudo*; and there are sufficient reasons for observing this standard in the ranking of creditors. That inhibition doth not communicate the right inhibited, is clear from the stile thereof, which discharges the granting rights in prejudice, &c.; and the stile of reduction thereon, which reduces in so far as prejudicial, &c.; so that an inhibition cannot be imagined to convey any thing, unless we could fancy contradictions, that a prohibition is a constitution, or a reduction a creation; yea, a communication of right betwixt co-adjudgers needed a particular statute in the year 1661. How can adjudgers, on debts prior to the inhibitions, be prejudiced by the inhibitor's taking up the annualrenter's place, and throwing them back upon the simple adjudgers? *2do*, Had the annualrenter renounced his annualrent before the competition, must not the inhibitor be content to take his equal share with the adjudgers? Or, might not the annualrenters ly by till the adjudgers are ranked, and get their shares in land or money, and then require their money from the

* See INHIBITION.

simple adjudgers ; which the inhibiting adjudger, who derives no right from them, cannot hinder? *3tio*, It is *petitio principii* that the co-adjudgers upon debts, before the inhibition, affect only the free subject, deducting the annualrents ; for they adjudge the property with the burden of these annualrents, as servitudes thereon. The same rule holds, though the estate were wholly exhausted with annualrents, so as the simple adjudgers would in effect get nothing ; for still the inhibiting adjudger will draw no more from one of these annualrenters inhibited, than he would if no such annualrent existed. Again, it is the same thing, though, in lieu of an annualrent, the inhibited debtor had disposed a part of his property ; for even in that case, the inhibitor can adjudge that property only *in quantum* he could draw thereof from the co-adjudgers, if there had been no such disposition prior to their adjudications. *4to*, *Posito absurdo*, That the inhibiting adjudger came fully in place of the posterior annualrenter, and that the right of annualrent accrued to the inhibitor ; the annualrenter, after the inhibitor has drawn his proportion, cannot seek the same over again, or its price out of the estate, in prejudice of the simple adjudgers ; because that were twice payment of the same debt. *5to*, Not a farthing of what the annualrenter loses in a competition with the prior inhibiting adjudger, can come off the simple adjudgers ; because no person who incurs eviction through his own fault or deed, has any recourse even upon real warrandice against such as were innocent thereof ; seeing *culpa cuique sua non alteri nocet ; non debet uni per alium iniqua conditio inferri* ; and *ita est* that the annualrenter suffers only by his own fault, in taking a right of annualrent after the inhibition. *6to*, The estate is to be considered as at the time of the ranking, when creditors prior to the inhibition have adjudged, and thereby carried away so much of the property from the inhibitor, and not as it was at the executing of the inhibition ; because the inhibitor is no further eventually prejudiced by the annualrenter, but his prejudice ariseth *aliunde* from the concurrence of co-adjudgers ; and if the inhibitor were allowed more benefit by the annualrent than to salve his own proportion of the property, with respect to the concurring adjudgers ; the inhibition would not in the least prejudice the annualrent which contravened it, but only the innocent simple adjudgers who did nothing contrary to it, upon whom the annualrenter shifts forward, to repair what he wants by the inhibitor ; and *qui facit per alium, facit per se*. An inhibition hath not in all cases its full effect till payment, but only to annul posterior deeds, in so far as hurtful or prejudicial thereto ; albeit an arrestment bear, ay till payment be made, or caution found for that effect. The brocard, *vinco vincentem*, &c. holds only in a subordination and succession of rights depending upon one another, and not where every one's right is independent, and contrived by choice for his own security. The reason why the annualrenters refused to go into the scheme proposed by the inhibiting adjudgers, although apparently more beneficial to them, was, because there were as many inhibiting adjudgers prior to the annualrents, as would exhaust the whole estate ; and the annualrenters having once chased the simple adjudgers out of

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the field, the inhibitors would take all from the annualrenters; therefore the annualrenters chused rather to join with the simple adjudgers, from whom they would draw a share, without being obnoxious to a back-stroke from the inhibitors, than by concurring with them in prospect of more, to serve but, as the cat's foot in the fable, to pull out the chestnut for another.

Replied for the inhibiting adjudgers; All intended by the act of Parliament 1661, was to supply the distance or ignorance of creditors, by making all appraisers within year and day to come in alike, as if they had been in one appraising, without any innovation as to inhibitors or annualrenters; for appraisers before that statute might have come in *pari passu*, had they either appraised *simul et semel*, or concurred to appraise by a common trustee; and the whole adjudgers being in effect only joint proprietors of that part of the estate that is *unexhausted* by the annualrents, the inhibitors removing the annualrenters, have the sole benefit of their diligences, and the annualrenters are preferable for the remainder, in so far as not carried away by the inhibitors; for the inhibitor reduceth the annualrent *quoad* the annualrenter, in order to affect it by his adjudication; and the subsequent adjudgers are not wronged by the inhibitions, but by the annualrents that are preferable to them. *2do*, It is ridiculous to move a question about an annualrent extinguished; for who can doubt but the annualrent being extinguished, the inhibiting adjudger must come in contentedly with the simple adjudgers, when he hath no prize upon an extinct annualrent, nor can by his inhibition obtain repetition of what is paid, seeing *debiti soluti nulla conditio*.

THE LORDS found, That in the present competition the inhibiting adjudgers can only draw such a share, as would have belonged to them, if there had been no annualrent granted posterior to their inhibitions; and that they cannot have right to the remainder of the whole sums in their inhibitions, before the annualrenters can draw any share in the said competition.

For explicating this difficulty in the ranking of creditors, a third scheme was offered to the Lords: Supposing an estate of 12,000 merks, to be divided among three persons, creditors in 5000 merks each, viz. an inhibiting adjudger, an annualrenter prior to his adjudication, and posterior to the inhibition, and a co-adjudger within year and day of the inhibitor's adjudication, for a debt anterior to the same; the inhibitor's 5000 merks must first be laid aside, because law prefers him to the annualrents; then the annualrenter draws his 5000 merks; and thereafter the co-adjudger draws his share out of the remainder, and what fell to the inhibitor; so that the 7000 merks must divide equally betwixt the inhibitor and co-adjudger. Nor can the inhibitor grudge this, or come back upon the annualrenter; because here the annualrent-right did him no prejudice; his prejudice arising only from the act of Parliament bringing in the co-adjudgers *pari passu*, which is *res inter alios*. This scheme was learnedly and ingeniously illustrated by instances out of the Roman law, and a decision of the Court of Frizeland; but because the Lords did not consider it advising, I shall

no further insist in it, to perplex a matter that is already but too much embarrassed.

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Forbes, p. 303.

* * The same case is also reported by Dalrymple :

LANGTON's affairs having gone into disorder in the beginning of the year 1690, about the time of his retiring, he grants many heritable bonds of corroboration, whereupon infeftments followed before any adjudications could be expedite, and there were also many inhibitions, some older, some later, before the granting of several of these bonds of corroboration ; and the creditors did all generally adjudge within year and day. The debts and diligences did far exceed the debtor's estate ; whereupon a competition of creditors arising, several questions did occur which had never formerly been determined, especially in the ranking of simple and inhibiting adjudgers and annualrenters ; which questions were pleaded and determined without names of parties, but upon the nature of their several rights and diligences.

For the annualrenters it was *alleged* ; That their infeftments of annualrent being prior to all the adjudgers, they were preferable, and their annualrents payable in the first place before an adjudger could draw any share of the rents.

And for the inhibitors, That the sums in their inhibition must be fully satisfied before the posterior annualrenters could draw any share.

And for the simple adjudgers on debts anterior to the inhibitions, That the said inhibitions could not be any ways prejudicial to their debts, but that they as co-adjudgers with the inhibitors ought to draw the same share as if no inhibitions had been used.

These several propositions being all severally founded upon known principles of law, in case of competition betwixt any two of the three contending parties, but not reconcileable to one another in the competition of simple and adjudging inhibitors and annualrenters, which was the case that lay before the Lords to be decided ;

THE LORDS, after many hearings *in præsentia*, and very mature deliberation and reasoning among themselves, did at last come to establish certain rules for determining the present question, and the like that might occur in other processes of ranking, which of late had fallen to be more frequent ; and the decisions more accurate, in regard of the late acts of Parliament anent the sale of bankrupts estates.

The rules established by the Lords were these, *first*, That an inhibitor adjudger did not simply reduce posterior annualrenters, but only in as far as these annualrenters were prejudicial to the inhibitor ; and found, that inhibitors would draw such a share of the rents, or in case of sale of the property of the estate, as would have belonged to him if no posterior voluntary rights had been granted ; and found, that anterior creditors, adjudging within year and day of the

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inhibiter, could not be prejudged by the inhibition ; but that anterior creditors adjudging, would draw the same share of the common debtor's estate, as if there had been no inhibition used.

By this decision, the inhibitor did not obtain full payment of the sums in the inhibition before the annualrenter could draw any share, nor did the annualrenter lose all, but a part only ; nor was the annualrenter allowed to recur upon adjudgers for anterior debts for making up that share which the inhibitor reduced and cut off : as for example, suppose the case, that the subject affected is worth 12000 merks, and that there are three adjudgers *pari passu* for 5000 merks each, and one annualrenter effeiring to 6000 merks, and that one of the adjudgers is also an inhibitor before contracting the annualrenter's debt, the division falls thus ; the three adjudgers for equal sums do first divide the 12000 merks in equal parts, whereof each draws 4000 merks, and thereby lose each a 1000 merks ; the annualrenter being a common burden on the subject affected, and preferable to all the adjudications, claims 2000 merks from each of the three adjudgers, as a stock effeiring to his annualrent ; but the inhibiting adjudger strikes off his claim by virtue of his diligence of inhibition : but the posterior adjudgers having no defence, the annualrenter draws 2000 merks from each of them, whereby the inhibiting adjudger gets his full third share with the co-adjudgers, but loses a 1000 merks of his whole sum, and the annualrenter loses 2000 merks, and gets 4000 merks, and the co-adjudgers get each 2000 merks of the remaining 4000 merks.

According to this rule, the LORDS did uniformly determine in all subsequent rankings and sales for several years, and the rules are found practicable in all the variety of cases that did occur in the several processes of sale, which have been very frequent since that time ; but thereafter, in the case of Carriden, there happened a special circumstance, which had not been pleaded when the rule was established, and some alteration had also happened on the bench since that decision ; whereupon the whole foundation of that rule and decision was called in question, and often debated *in prasentia*, and several bills ; and after a review and full consideration of the case, the LORDS did proceed upon the same foundation, and strengthened the former rule.

Carriden's case occurred in the competition of the Creditors of Cockburnspath, a part of Nicolson's estate, and he being an inhibitor, and also an adjudger within year and day, ' THE LORDS found his adjudication null ; ' but he insisted as inhibitor for reducing the right of several debts after his inhibition, whereon adjudication had been led within year and day of other adjudgers on debts anterior, alleging that he could not be wholly excluded, while these adjudgers on posterior debts were admitted to a share of the price, for he could still adjudge, whereby his adjudication would be drawn back to his inhibition, and always be preferable to such adjudgers whose debts were posterior to his diligence.

To which it was *answered* : That his adjudication could afford him no share, because, setting aside all the posterior creditors, the diligences on anterior debts were far beyond the value of the subject of the competition ; and seeing his in-

hibition could not prejudice these anterior debts nor diligences, it afforded no prejudice to him that posterior creditors, by their diligence, came in *pari passu* to get a share with anterior creditors; because though these posterior debts had never been contracted, Carriden was utterly excluded, and his inhibition was only a prohibitory diligence, whereupon he could not reduce posterior debts simply, but in so far as they were prejudicial to his debt, and his after adjudication could not state him in the case of these posterior annualrenters, so as to make the benefit of their annualrents accresce to him.

Upon the several debates in that case, the LORDS at last by their interlocutor the 15th of February 1698, found that an inhibitor cannot be prejudged by posterior debts, nor anterior creditors prejudged by an inhibitor; and found that the contracting of debts after an inhibition, could not be profitable to an inhibitor, nor does their diligence accresce to him; and that therefore Carriden could draw no share of the price of Cockburns-path. See No 92. p. 2376., and *voce* INHIBITION.

According to these rules, all the rankings have ever proceeded uniformly without any contradiction. But of late, in the competition of the Creditors of Langton, that rule was again called in question; and, upon a petition several times moved by the inhibitors, a hearing allowed *in prasentia*, in which it was alleged that the rule above set down could not consist with the true effect of an inhibition, which was not only a prohibitory, but a preparatory diligence; and that an adjudication coming after, whether within year and day of other adjudgers or not, was always to be drawn back to the date of the inhibition, so as to remove all posterior annualrents or other diligences on posterior debts; and these being removed, the inhibitor fell to come in to get the full payment of the debts in his inhibition, at least to the extent of the voluntary rights, and then the annualrenter being preferable by the nature of his right and security, came in the next place to get the full payment preferable to posterior co-adjudgers; as for example, in the case formerly stated of a subject to the value of 12000 merks, and three adjudgers for 5000 merks each, and an annualrenter effeiring to 6000 merks, the annualrenter, as preferable, draws first his share of 6000 merks, which is set aside; so the remaining 6000 merks being divided in three, each adjudger gets 2000 merks; but the inhibiting adjudger recurs upon the annualrenter by virtue of his diligence, from whom he draws 3000 merks more to make up his 5000 merks: then the annualrenter, by the nature of his right, being preferable to the co-adjudgers, recurs on them, from whom he draws the said 3000 merks: so remains only to the co-adjudgers 1000 merks.

For enforcing this, the inhibitor insisted upon the nature of the diligence, *alleging*, That the adjudger's diligence reached nothing but the reversion over and above the annualrent, which was preferable upon every part of the subject adjudged, and therefore the inhibitor getting his full share by virtue of his adjudication and inhibition, the annualrent lay upon the shares of the co-adjudgers; and it often happens, that an inhibitor gets a better share by reason of posterior voluntary rights, than he would have had without them: as for example, suppose that in place of a right of annualrent, a posterior creditor ob-

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tained either a proper wadset, or a redeemable right of a part of the debtor's estate, and being thereupon in debt, was preferable to the posterior adjudgers; in that case the inhibitor would have an equal share with the co-adjudgers if within year and day, and what were wanting would be made up to him, by affecting the wadset or right of property made after his inhibition, wherein the co-adjudgers would have no share nor interest, and by that means the full sum in the inhibition would be made up, and he in a much better condition than he would have been if no posterior right had been granted; and suppose again, that this inhibitor had not adjudged within year and day, he would indeed have had no share in the reversion or superplus with prior adjudgers, but his diligence would have been drawn back to procure to him full payment of the sums in his inhibition, at least so far as the value of the posterior voluntary right did extend to; and there is no reason that the case of an inhibitor should be worse where there is a posterior annualrent, than it would be if a proper wadset or partial right of property had been granted.

To all which it was *answered*; That there was no reason offered to make any alteration in the rules laid down by the Lords upon full debate and mature consideration, and of purpose to be a direction in the like cases, and which had now obtained by the space of eighteen or nineteen years, and whereupon every perplexity that has happened in the ranking of creditors has uniformly been resolved, and the rule applied agreeably to the principles of law, without injustice to the inhibitor, or any cause of complaint; and as the acts of sederunt of the Lords of Session are the most solid rules of their decisions in time coming, so few acts of sederunt have ever been made upon so full and mature consideration, and to overturn it now would imply no small reflection, and shake the trust and confidence that the leiges ought to have in their acts of sederunt and uniform decisions; and it would appear most incongruous, that, during the space of so many years one rule should be followed, during which time more rankings have been determined than for 100 years before, and that the same rule should be altered now, without the intervention of any new matter of fact or material circumstance; which would put the leiges in a perpetual uncertainty, and give a just grudge to multitudes of creditors, whose interest had been determined on the former rule, and possibly occasion the reversing of many former decreets; which are all weighty inconveniencies, and should require some evident and pregnant consideration to balance them.

2do, As to the rules themselves, they are most just and equitable, and nothing material objected.

The fundamental rules are, *1mo*, That an inhibitor cannot be prejudged by posterior debts. *2do*, That an anterior creditor can no ways be prejudged by an inhibition; whereas, by what is now pleaded, an inhibition would strike more effectually against the prior creditor, than the posterior annualrenter; for though the inhibitor recurs upon the annualrenter as posterior, the annualrenter again recurs upon the adjudgers whose debts were contracted prior to the inhi-

bition ; by which means the annualrenter loses nothing, though the inhibition ought only to strike against posterior voluntary deeds ; and the adjudger on prior debts is at the whole loss, albeit it be a most certain principle, that an inhibition has no imaginable effect against anterior debts and diligences following thereupon ; so that there must certainly be a fallacy in that reasoning ; and there is no manner of mystery, or the least difficulty in finding where the fallacy lies, viz. an inhibition is no ground of reduction of posterior debts simply to annul them, but only in as far as they are prejudicial to the debt in the inhibition ; that is to say, in so far as the inhibitor fails to draw a less share of the estate or rents thereof, than he would have obtained if no posterior voluntary deed had been done ; and an inhibition is merely a prohibitory diligence for removing the prejudice of posterior deeds, but does not give any positive right, nor state the inhibitor adjudger in the place of the annualrenter, so as to draw a share by virtue of the right of annualrent, as the inhibitor must acknowledge by his own argument ; for, if the inhibitor came in the place of the annualrenter, that is to say, if the right of annualrent did accresce to the inhibitor, then the inhibitor getting payment in the right of the annualrenter, would extinguish the annualrent, and consequently the annualrenter could never recur upon the co-adjudgers : so that the scheme offered by the inhibitors is inconsistent with law and reason in every circumstance ; for the inhibitor can never have what was competent to the annualrenter, but by coming in his place, and causing the annualrent to accresce ; which were a notion absurd and inconsistent ; and what is urged, that an inhibition is not only a prohibitory, but a preparatory diligence, is a new invented notion, never heard of in any former case, and without any foundation in law.

And whereas it is *alleged* ; That in the case of a proper wadset, or a partial right of property after inhibition, and before the adjudications, the inhibitor strikes out the posterior wadsetter or purchaser, and comes in his place ; from which it is inferred, *1mo*, That an inhibitor may have advantage by posterior voluntary deeds ; *2do*, What must be acknowledged to be in the case of a proper wadset, or an irredeemable right of property, ought also to hold in the case betwixt the competing annualrenter and inhibitor,

It is *answered* ; That, in the case proposed, an inhibitor may have an accidental advantage in the competition with other creditors by posterior voluntary deeds ; for the inhibitor would not only have a share with the co-adjudgers in the reversion of the debtor's other estate, but further would affect the lands irredeemably disposed or wadset after his inhibition, but cannot have the like benefit in the case of an annualrenter ; and it often happens, that by a competition a greater benefit arises to some creditors than would do, if some of the parties competing were out of the field, because, in competitions of many creditors, there must be general rules and foundations in law with regard to the rights and interests of the several creditors competing, which alter if the rights of some of these creditors be drawn out of the field ; as, for example, in the competition betwixt an inhibition and a posterior voluntary right, without the con-

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course of other creditors, the inhibition is always preferable; but in the competition of many other creditors, the inhibitor may happen to be totally excluded, and posterior rights get a share.

To apply this to the case proposed, a proper wadsetter or a right of property of a part of the debtor's estate does wholly separate and set apart the wadset right or the property from the debtor's estate in competition with posterior adjudgers, whereby they are entirely excluded from that wadset or right of property; but *quoad* the inhibitor, the wadset or right of property is null; and therefore the inhibiting adjudger removing the voluntary right by his inhibition, comes to receive the benefit of the voluntary right, so far as is wanting to him by his diligence in competition with co-adjudgers or other creditors; whereof the reason is plain, because such voluntary rights do in the first place wholly exclude adjudgers, not inhibitors, and then the competition falls singly betwixt inhibitors, and posterior purchasers; and in the competition of these two, the inhibitor is ever preferred; but that makes nothing to the advantage of what is now urged to be a rule in the competition of simple and inhibiting adjudgers and annualrenters; for,

1mo, The posterior wadsetter or purchaser so excluded does not recur upon the posterior adjudgers, but only suffers the loss, as having rested upon voluntary rights without diligence; and so the rule above set down, that prior creditors are not prejudged by the inhibition, stands still good; whereas, in the present debate, it is alleged, that as the inhibitor recurs upon the annualrenter, so the annualrenter also recurs upon adjudgers and anterior debts.

2do, There is a manifest disparity betwixt the case of an annualrenter and a proper wadsetter or purchaser of a part of the debtor's estate by an irredeemable right; for the last two do entirely divide and separate the wadset or irredeemable right from the remainder of the debtor's estate, and thereby do wholly withdraw his purchase from the posterior adjudgers; whereas an annualrent-right resembles a servitude, and is a burden consisting with the property, and affecting every part thereof; and therefore, the posterior adjudgers carry the property so affected: and when these adjudgers divide the property or the rents, the annualrent which lies as a burden, is equally proportioned among the adjudgers, according to their dividends; but, that proportion of the annualrent, which falls upon the share of the inhibiting adjudger, is struck off, whereby he gets the same share that would have fallen to him if there had been no annualrent; and, because the said share of the annualrent is cut off by the diligence of an inhibition, the annualrenter is at a loss, and cannot recur upon the adjudgers who did not inhibit, because the inhibition can no more prejudice anterior creditors, than posterior deeds can prejudice the inhibitor; as for example, in the case above stated, of a competition for a stock of 12000 merks, the three adjudgers *pari passu* for 5000 merks each, get only 4000 merks, and the annualrenter effeiring to 6000 merks, gets 2000 merks from each of the two adjudgers who did not inhibit, but draws nothing from the inhibitor, as being after his diligence; and suppose again, that the inhibitor were not *pari*

passu with the other two adjudgers, but year and day after them, these two adjudgers would first draw their full 10,000 merks out of the common stock, whereby there would remain 2000 merks to the annualrenter, and then the annualrenter would draw his other 4000 merks from the two first adjudgers, which would make up his whole annualrent; but the inhibitor, who was not within year and day, would reduce the annualrent, in so far as extended to the 2000 merks more than fell to the two first adjudgers; because, though the first two adjudgers were preferable as to their 10,000 merks, and in so far as the annualrenter drew from them, the inhibitor was not prejudged; but, as to the surplus of 2000 merks, the competition falling betwixt the inhibitor and a posterior annualrenter, the inhibitor is entirely preferred; but, suppose again, that there were three adjudgers *pari passu* still for 5000 merks, and an inhibitor adjudger year and day after for the like sum, and an annualrenter as formerly; in that case, the three adjudgers on anterior debts would each draw 4000 merks, and the annualrenter would draw 2000 merks from each of them, and so obtain full payment; and the inhibitor adjudger not within year and day would get nothing, albeit the posterior annualrenter gets all, as was found in the fore-cited case of Carriden, because the inhibitor is not prejudged by the annualrenter, who can never compete if the question were betwixt them two; but the whole stock being affected and exhausted by preferable adjudications for anterior debts, the inhibitor is thereby effectually excluded by his own negligence, and the diligence of the other creditors, and is noways prejudged by the annualrenter, who by his preference to the co-adjudger gets his full annualrent; which the inhibitor ought not to envy, and cannot quarrel the annualrenter's advantage, not being in defraud and prejudice of him; and thus it happens, that in the competition of many creditors, the division being made according to foundations and principles of law, a voluntary right obtains preference and payment, when an anterior inhibitor is wholly excluded, not by the annualrenter, but by other competing creditors; and, it is a mistaken notion of the import of an inhibition to imagine, that an inhibition gives any positive right, or that the inhibitor is prejudged as long as he gets not his full payment preferable to posterior annualrents, for the effect of his diligence is only that he do not get less than if those annualrents had not been granted, or that in competition with voluntary rights alone, and without the intervention of other competing creditors, the inhibitor is always preferred to the voluntary right; but, where other creditors come in *pari passu*, or are preferable to the inhibitor, and postponed to the annualrenter, every creditor draws his share according to the nature of his right and diligence.

THE LORDS found, that in the competition of simple and inhibiting adjudgers and annualrenters, the inhibiting adjudger could only reduce the posterior annualrent in so far as he was thereby prejudged, and that he could not claim full payment of the sums in his inhibition, before the annualrenter could

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draw any share in the said competition, but could only draw such a share of the annualrents, or price, as he would have drawn, if there had been no posterior annualrent or voluntary right.

Dalrymple, No 89. p. 120.

1715. February 22.

ELISABETH GELLY, and Others *against* The Other CREDITORS of Monimusk, and their FACTOR.

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Personal creditors arrested in the hands of tenants. The debtor's factor, notwithstanding, uplifted the rents. Other creditors got the estate sequestrated, and a judicial factor appointed. These last creditors likewise adjudged. The arresters had the preferable right to the sum in the hands of the debtor's factor.

ELISABETH GELLY and Others, creditors of Monimusk, having arrested on their personal obligations in the tenant's hands, Alexander Pierie, Monimusk's chamberlain, does nevertheless take up the arrested money out of their hands; and the other creditors having thereafter got the estate sequestrated in the hands of James Man, as factor by the Lords, with power to him to uplift rents, &c. and call Pierie to an account; and going on also in adjudications, &c. the arresters raise a furthcoming, both against the tenants, and also call Pierie as he who uplifted the rents affected by them. Man also, the creditors' factor, insists against Pierie and their tenants for the bygone rents, and the sums uplifted by Pierie from them. This having occasioned a competition, the point in question was, whether these arresters have a point of preference to these rents, and to repeat the same from Pierie, though no arrestment was used against him? Or if Man, the other creditors' factor, have a preferable title to the balance in Pierie's hands, arising from his intromissions with the rents arrested?

It was *alleged* for Man; That, by his commission from the Lords, he was empowered to uplift, not only the rents from the tenants, but likewise to call Pierie, the common debtors' chamberlain, to account for his intromissions; and that the said arresters had not affected the balance in Pierie's hands; and therefore could not in an action of furthcoming obtain decret against Pierie.

Answered for the arresters; That the said balance belonged to them, because it proceeded from Pierie's intromissions with the rents which they had arrested in the tenants' hands; and his intromission being as Chamberlain to the common debtor, was obnoxious to their action of furthcoming in the same way with the tenants; since the arrestment was a *nexus realis*, affording an action of repetition against any intromitter; nor could a voluntary payment dissolve it; so that these rents could be only uplifted by Pierie *cum suo onere*, and consequently he liable here, though no new diligence was used against him.

Replied for the other Creditors; That they had raised summons of adjudication before the arrestments were used; now adjudications give right to the mails and duties before arrestments.

Duplied for the Arresters; That they were only seeking preference to bygone rents, and rents of the term current, before any adjudication was complete; for till then no adjudger could compete with an arrester for mails and duties, as was

found Lister *contra* Aiton and Sleich, No 13. p. 2765.; far less is a naked summons of adjudication to be noticed; for whatever that may operate against voluntary deeds of the debtor, yet it has no effect against a lawful creditor using arrestment.

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THE LORDS found, That Pierie the Chamberlain, having intromitted with what was arrested in the tenants' hands, he was liable to the arresters for the same; and therefore preferred the arresters to Man, the subsequent factor, as to the balance in Pierie's hands, in so far as their arrestments gave them interest therein, or extended to.

Act. Hay.

Alt. Horn.

Clerk, Robertson.

Bruce, No 87. p. 104.

February 1730.

CAMPBELL *against* DRUMMOND.

THE estate of Tofts being sold at a public auction, and the decret of ranking remitted to an accountant, to make out a scheme for dividing the price among the creditors; an objection was started against the scheme, to understand which, the following facts must be premised; 1^{mo}, Susanna Belshes had an inhibition in the 1672, and an adjudication in the 1685, both upon the same debt; 2^{do}, Kippenross had an inhibition in the 1673, and, upon the same debt, an heritable bond of corroboration *anno* 1679, with sasine upon it; which heritable bond consequently was struck at by the inhibition of Susanna Belshes; 3^{tio}, A number of annualrenters, some prior, some posterior to that of Kippenross, but all of them struck at by his inhibition; 4^{to}, A number of adjudgers in the 1685: coming in *pari passu* with the adjudication of Susanna Belshes, struck at by neither of the inhibitions. To reduce this case to its simplest terms with respect to Kippenross, the operation of his inhibition was first considered; which striking against the annualrenters, made his case the same as if these annualrenters were not in the field; and the inhibition itself was also laid aside, it having in this manner got its full effect. The case being reduced to its simplest terms, the ranking as to Kippenross comes out thus: Kippenross's infestment of annualrent obtains the *first* place; and in the *second* place come the adjudgers, one of whom, viz. Susanna Belshes, has an inhibition that strikes against the infestment of annualrent.

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A preferable annualrenter, from whom a part is drawn by an inhibition, cannot recur against the posterior annualrenter to make up his loss.

The question is, In what proportions is the price to be divided among these creditors? The annualrenter, in the first place, draws his whole sum; and the inhibitor draws from him, whatever she could draw were he not in the field. So far the matter is clear. But can the annualrenter recur against the adjudgers, for any share of what is thus drawn from him by the inhibition? The scheme says no; the objector says yes.

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In order to resolve this intricate question, it must be premised, that an inhibition is not a real right, but merely a personal prohibition, directed against the debtor and against lieges, forbidding them to concur in any deed prejudicial to the inhibitor; and that, consequently, it affords only a personal challenge, which does not alter nor disturb the real preferences.

The nature of an inhibition being thus ascertained, the first thing to be examined with relation to the present question, is, what effect an inhibition ought to have in a ranking. Suppose three annualrenters, A, B, C, following one another in the order of time, and ranked accordingly: C, the last annualrenter, has an inhibition striking against A, the first annualrenter: The estate is L. 800, and the sum in each of the annualrent rights L. 400. Upon this supposition, A, the first annualrenter, is ranked *primo loco*, and draws his whole sum, viz. L. 400; which, being an extinction of his annualrent-right by payment, disburdens the estate so far. B, the second annualrenter, draws all that remains, being other L. 400; and thus C, in quality of annualrenter, is cut out, and draws nothing. But then, when we consider the personal claims or objections that one creditor may have against another, we find that C, having an inhibition against A, must draw from him, by a personal action or claim, whatever he would have drawn by virtue of his annualrent-right had A never existed, which is no less than his whole L. 400; and accordingly, the ultimate division comes out as follows; B gets L. 400, C L. 400, and A nothing. With respect to this supposed case, the objector must say, that A, to make up what was drawn from him by the inhibitor, is entitled to recur against B; which lands in giving C L. 400, A L. 400, and B nothing. And he comes at this conclusion, by conceiving that C, by virtue of his inhibition, must be ranked in the first place, A in the second place, and B in the last place. But this obviously is fallacious; for first, an inhibition, as said above, gives no preference, affording only a personal challenge or ground of reduction; and next, let A and C adjust their preferences as they best can, B, the second annualrenter, against whom the inhibition strikes not, must in all events possess the second place. For to cut out B, according to the objection, is to give an extreme absurd operation to an inhibition: It is made to exclude B, though it has no cause of reduction against him; and it is made to save A, though it is against A that it strikes.

There is another case which tends to illustrate this subject. A liferentrix who has the preferable right upon the estate, consents to the preference of a creditor, which wives are frequently enticed to do; another creditor has an infestment of annualrent interjected betwixt the liferent-right and the right consented to. The consent here cannot disturb the real preferences: The liferentrix must be ranked *primo loco*, the other creditor *secundo loco*, and the creditor consented to *ultimo loco*; and in that order they must draw their respective proportions, and the estate of consequence be disburdened. The creditor ranked in the last place, must, indeed, by virtue of the consent, draw from the liferentrix whatever he would have drawn, had the liferentrix not been in the field. But

this can never entitle the liferentrix to recur against the annualrenter, ranked in the second place : As to him, the consent is *res inter alios*, which can neither hurt him nor do him service.

Upon the foresaid doctrine, are built the following practical rules, which, from the time of Lord Stair who settled them, have been observed in all rankings. The real rights are first ranked in their order ; and after their sums are allocated to them out of the price, the estate is of course disburdened of them. Next are considered the partial challenges or reasons of reduction, that any of the creditors may have against others. As to such, the rule is, that when a preferable creditor draws his payment out of the price, he, with respect to the other real creditors, is considered as out of the field ; and whatever personal challenge may be competent against him by any particular creditor, they, the other real creditors, are by no means concerned. See Stair, b. 4. tit. 35. § 29.

To apply this train of reasoning to the case in controversy, viz. an annualrenter and two posterior adjudgers, one of whom has an inhibition striking against the annualrenter ; Lord Stair, in the place above cited, has well fixed, that the annualrent-right must be ranked first, and the adjudications in the second place *pari passu*. Then he considers the effect of the inhibitor's personal claim against the annualrenter ; but allows not the annualrenter to recur against the other adjudger for what was drawn from him by the inhibitor. The objector, on the contrary, would have the inhibiting adjudger to be ranked *primo loco*, in place of the annualrenter, because the inhibition strikes against him : He would have the annualrenter, beat out of his own place, to take up the place of the other adjudger, leaving him to be ranked *ultimo loco*.

To sum up all ; when Kippenross pleads upon his inhibition, its full effect is given to it, by striking out of the ranking all the posterior infeftments of annualrent : When he pleads upon his infeftment, he is ranked for his whole sum ; and when this sum is set apart for him, the estate is of course disburdened of the incumbrance. There is indeed a personal claim against him by virtue of an inhibition, which takes from him some share of his draught. But this inhibition militates against Kippenross solely, not against the posterior adjudgers : They cannot be in a better or worse condition than if that inhibition were not in the field.

' Found, That Kippenross's infeftment, being once ranked so as to draw his share in competition with the other real creditors, he cannot recur against the posterior real creditors for any part of what is drawn from him by Susanna Belshes, her inhibition.'

In a reclaiming petition, the objector endeavoured to mould his argument into another shape. He *pleaded*, according to the rule laid down by Lord Stair, b. 4. tit. 35. § 28. ' That the adjudgers are not to be accounted as joint proprietors, and the infeftments of annualrents as servitudes on the property.' Whence he drew this inference, That as it is the privilege of an annualrenter to affect any part of the ground *in solidum*, Kippenross is entitled to draw his

- No 96. whole sum out of the part occupied by the adjudger who has not an inhibition ; nay, must do so, because he is barred from attacking the inhibiting adjudger. But the *answer* was obvious, *imo*, That this argument proceeds upon a fallacy, as if each adjudger possessed a separate tenement, and as if the annualrent were a burden upon both tenements ; whereas, there is but one subject, viz. the estate of Tofts, over the whole of which, each adjudger has a right *pro indiviso*. This shows the emptiness of the objector's argument ; for there can be no partition of the land, or of the price, betwixt the two adjudgers, till the burdens that affect their joint-property, and in particular the annualrent-right, be discharged, leaving the remainder clear to be divided equally betwixt the adjudgers ; *2do*, *Esto* the objector's rule were to take place, viz. first to divide the common subject betwixt the two adjudgers as joint proprietors ; the next thing to be done, would be to divide the common burdens also ; by which means no more but the one half of the annualrent-right would fall upon the simple adjudger. It is true, the annualrenter might, notwithstanding, draw his whole sum from the simple adjudger ; but then, this adjudger would, without controversy, be entitled to recover from the co-adjudger the half of the said sum, for which he, the co-adjudger, was ultimately liable. And this comes to the same with what is determined by the Court.

' The bill was refused without answers.'

Fol. Dic. v. 1. p. 184. Rem. Dec. v. 2. No 1. p. 1.

1739. February 7.

HOGG and the Other CREDITORS of the EARL of BUCHAN, *against* COLONEL GAIRDNER.

- No 97. WHERE, in a competition of creditors, one has a preferable security over two subjects, from both of which he debars a secondary creditor till he recover his payment, not only will he be obliged to assign to the secondary creditor upon payment made to him by the secondary creditor, but he will even be obliged to assign when he debars the secondary creditor, and draws his payment out of the subject ; for though that may appear an extinction of his debt, as no doubt it is in strict law, yet in practice it is considered as if the debt had been extinguished by the money of the secondary and postponed creditor.

Kilkerran, (COMPETITION.) No 1. p. 136.

1739. February 7.

A. *against* B.

No 98.

IN a competition of creditors for the rents of an entailed estate, where one of them had a debt, which also affected the fee, he was found not obliged to assign to those whose debts did not affect the fee.

In no case is one entitled to an assignation to a diligence affecting a subject which he has not himself affected.

No 98.

Kilkerran, (COMPETITION.) No 2. p. 136.

1739. *December.* CREDITORS of KIRKCONNEL Competing.

JOHN GORDON purchased the lands of Kirkconnel at a public sale; and, before he himself was infest upon his decret of sale, granted several heritable bonds, upon which the creditors took infestment at different times. In a competition of his creditors, it was *pleaded* for the latest annualrenters, That the annualrent-rights, being originally ineffectual as to any real right upon the land, were validated by the common debtor's infestment, and no sooner; and therefore, that they ought all to be ranked *pari passu*; as no creditor can maintain that his real right is of an earlier date than that of his competitor.

No 99.
Annualrent rights, granted by a debtor before his infestment, are ranked according to their dates, as if the debtor had been first infest.

'THE COURT, notwithstanding, preferred the creditors according to the dates of their infestments, in the same manner as when granted by a debtor infest.'

Rem. Dec. v. 2. No 11. p. 24.

1745. *February 21.* ARCHIBALD BONTEIN *against* BONTEIN of Mildovan.

ROBERT BONTEIN of Mildovan, by an agreement with Archibald, his eldest son, settled upon him L. 20 Sterling yearly in name of aliment.

Afterwards, falling into bad circumstances, and being incarcerated for debt, he *pleaded* against his son; who was in a good way, the *beneficium competentiae*; the LORD ORDINARY, 14th January 1744; 'found that the father was entitled to the *beneficium competentiae*.'

Pleaded in a reclaiming bill, That this benefit was no part of our law, William Dick against Sir Andrew Dick, No 40. p. 409.; 24th February 1669, between the same parties, No 1. p. 1389.; and Harcarse, title SUMMONS, July 1687, Cairns against Cairns of Bellamore, No 2. p. 1389.

2dly, The present aliment was not *in constituendo*, but was already constitute.

And, 3dly, The action was founded on a contract, not solely on the *pietas paterna*.

Answered, Wherever an action for aliment would be competent, there this defence behoved to be sustained. There could be few decisions of aliments decreed to parents, because few children would stand pursuits of this sort; but one was condescended on, viz. Brown of Thornydykes against his two Sons, No 82. p. 448. though here, out of regard to the sons, it behoved to be noticed, that the dispute was rather, which of them should be charged with their father's aliment, than if he should be alimented.

THE LORDS adhered.

No 100.

A father, debtor to his son, having been freed of the debt on account of the *beneficium competentiae*; it was made a question, but not decided, whether the son might charge his claim on his father's estate, so as to compete with his other creditors.

No 100.

There being other points in the petition, particularly how far the son might be allowed to charge his claim on the estate, to enable him to compete with other creditors, though it should be found he could not insist personally against his father. It was remitted to the Lord Ordinary to hear parties thereon. See No 3. p. 1390.

Act. *Graham, sen,*Alt. *Haldane.*Clerk, *Murray,**D. Falconer, v. 1. p. 80.*

No 101.

In a competition among annualrenters, in a case where an inhibition was prior in date to them all, it was found, that the deficiency of funds did not affect equally, or *pro rata*, all the annualrenters, who stood preferred the one to the other, but affected only the last.

1747. *January 10. LITHGOW against The other Creditors of ARMSTRONG.*

IN the ranking of the creditors of Francis Armstrong of Whitehaugh, there were three infestments, and an inhibition prior to all the infestments, with an adjudication on the ground of the inhibition, and which debts did more than exhaust the subject. John Lithgow had the first and preferable infestment over the whole subjects belonging to the debtor, next to him, William and Henry Elliots had infestment on the lands of Whitehaugh, and after them, William Elliot of Bradly; and, upon the other tenement of Snobberty, John Elliot of Binks had an infestment after John Lithgow. But then the Earl of Leven had the inhibition prior to all the infestments; which, how soon it appeared in the ranking, the other creditors, whose infestments were posterior to John Lithgow's, purchased at L. 175 Sterling; and, by the scheme of division, this sum was allocated proportionally upon the shares drawn by each of the infesters, who were all struck at by the inhibition.

Of this allocation, John Lithgow the first infester complained, insisting, that he ought to bear no burden of any part of the sum drawn by the inhibitor, but that the same ought to be laid wholly upon the last infestment; and that upon these principles, that an inhibition has no operation for the benefit of any person whatever, other than the person at whose instance it is served, and that even in his favour it has no operation against any debt, though contracted after the inhibition, further than in so far as that debt prevents the inhibitor from drawing what he would have drawn if it had not been contracted, and that no infester can be prejudiced by the contraction of debts after his infestment.

Answered for John Elliot of Binks the last infester, That the scheme is in this case made out in the very same way that all schemes have been made, as far back as there is record of the practice of the Court: There is first a general ranking of the several debts according to the dates of the infestments; but when the creditor has drawn in this general ranking, and that an inhibitor is to be satisfied of his debt, there is a second ranking or draught whereby he, the inhibitor, takes back proportionally from each creditor in the general ranking struck at by the inhibition, without distinction of the priority of the infestments among themselves: And the reason is, that an inhibition is a legal prohibition issued out against the debtor, discharging him to do any deed whereby

any part of his lands may be evicted from him in prejudice of the complainer, and discharging the whole lieges to accept of any right from him, whereby any part thereof may be evicted from him ; and, the effect of it is, to set aside all deeds simply and absolutely, which are granted *lege prohibente*, the first as well as the last ; and as the inhibitor reduces all deeds done after his inhibition, he is not allowed to load one and free another ; but the law lays the burden proportionally. And therefore it is, that if a creditor has a general infeftment on two tenements, and the debtor thereafter sells the two tenements to different purchasers, which ever of the two purchasers the inhibitor should think fit to attack, he will be obliged to assign against the other ; and if each of the purchasers is entitled to demand an assignation, it is impossible this can resolve in any other issue than a proportional allocation of the common burden upon each of them *pro rata*. And, it is no less certain, that the creditor from whom an inhibitor draws any part of the sum, for which such creditor was preferred in the general ranking, cannot recur against the other creditor, though posterior to his infeftment, for the sums so taken from him ; because *quoad* them, he has already drawn his whole debt, and cannot draw it over again, which were to make them liable to repair a damage he had suffered upon the account of a defect in his own right.

And as these were said to be the principles upon which the rule pleaded for is founded, it was said to be in practice established in the case of the ranking of the creditors of Sir William and Sir Thomas Nicolson, No 92. p. 2876., which has been ever since followed uniformly (except in the case of the creditors of Ross of Gabtoun, where the accountant was said to have departed from the Lords) viz. in the ranking of the creditors of Hallgreen, of the creditors of Dalmahoy, of the creditors of Tannachy, of Hamilton of Abbayhill, of Mr William Stirling, of Lindsay of Mains, of Boswell of Balbertoun, and of Belches of Tofts. (See GENERAL LIST of NAMES.)

And to obviate an objection, that, at this rate, it would not be in the power of a creditor who lends upon an infeftment after an inhibition to secure himself by any form of law, it was said there were many methods in law whereby he might obtain a security liable to no challenge ; such as, *first*, By advancing a little more money to clear the inhibition ; or, *2dly*, By causing the debtor grant infeftment to the inhibitor, by which his debt may be secured as well his own ; or, *3dly*, By inhibiting the debtor upon his warrandice, upon which he may have recourse against other subjects belonging to him ; or, *4thly*, By taking infeftment of warrandice against the effect of the inhibition. But if none of these methods is used, he has himself to blame if he suffer by the inhibition he saw on the record before he lent his money : Nay, if none of these methods is taken, it may happen that an infester may lose his money were the estate of ten times more value than to pay both the debt secured by inhibition, and the debt secured by infeftment. E. G. Where the heir of the debtor sells the land, and the purchaser pays the price, but retains to the value of the annualrent ; in that

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case, the purchaser is liable to the annualrenter, but has no concern with the inhibition, yet the inhibitor will draw from the annualrenter to the extent of his sum. It is not, therefore, peculiar to this case where the subject is wholly exhausted by infeftments, that an infefter is not secure against the effect of a prior inhibition, unless he take the proper methods which the law allows for his security.

Replied for John Lithgow, That it may be true, that the schemers have often followed the method which the answer sets out with, as the universal practice, without distinguishing the cases in which the loss occasioned by the inhibition should be allocated proportionally among the creditors struck at by the inhibition, and when not; though even that practice, as should be hereafter shewn, has not been so universal as is alleged; yet, however that be, the reasonings in point of principle, brought in the answer to justify it, were said either to be such as have no foundation in law, or are altogether misapplied.

Of the first kind was said to be the leading proposition, and which is the foundation of all the rest, That an inhibition affects equally all debts posterior to it, as being all contracted *spreta inhibitione*; a proposition by no means true; as an inhibition is not a prohibition to the debtor to contract any debt whatever; but only to contract debt whereby the debtor's estate may be evicted in prejudice of the inhibitor; and therefore it affects only such debts as prejudice him, but affects not debts whereupon even the lands are evicted, where that eviction does no prejudice to the inhibitor: And it was said, that there are two cases wherein this happens, and that there is not a third.

One is where the inhibitor can draw nothing, though the debt struck at by the inhibition had not been contracted; for example, where there are adjudications upon debts prior to the inhibition, which exhaust the debtor's estate; and that the inhibitor has omitted to adjudge on his debt within year and day of the first effectual adjudication: In that case, if a creditor, whose debt is after the inhibition, has adjudged within year and day of the other adjudgers, he will draw proportionally with them; nor can the inhibitor challenge his debt, because he is not prejudiced by it, seeing that *esto* it had not been contracted, he could have drawn nothing, the estate being supposed to be exhausted by debts, against which the inhibition does not strike.

The other cannot be better exemplified than in the present case, where the inhibitor has nothing to do but to put out his hand and take his money (supposed to be lying on the table) from the creditor who in the ranking of the creditors struck at by the inhibition is the last drawer; and, which is the case in all finished rankings, and where the matter is brought to the making up the scheme of division; for in that case he cannot say he is prejudiced by the creditor who is preferable in that ranking, when he draws all that he is entitled to; nor can the last drawer oppose him, unless it could be maintained that the last drawer could plead a benefit to himself from the inhibition, which neither in reason, nor agreeable to principles, any one can do other than the inhibitor.

himself, and even not he himself further than he is prejudiced by the debt he challenges as has been said.

Nor is this rule, for determining upon which of the creditors struck at by the inhibition, the loss occasioned by it lies, peculiar to the present case, though as being the most simple case that can occur in a ranking, it is the plainest example of it, where the inhibition strikes against the whole other creditors; for, every case that can occur must be governed by the same rules. Suppose, for example, that, in this case, John Lithgow's infestment had been prior to the inhibition, it must be admitted, that as he was also prior to all the other infesters, he must have drawn his full payment, as he was not struck at by the inhibition, and then the same rule would have taken place with respect to his present competitors, that the last drawer would have sustained the whole loss occasioned by the inhibition: And indeed, nothing can better illustrate the present case than this instance, for, what can it import the other infesters, that his infestment is posterior to the inhibition, when still preferable to theirs, unless they can be heard to take the benefit of another's diligence.

In short, the just conception of this whole matter, and which applies to every case that can occur, is, that the interest which falls to the whole creditors struck at by the inhibition, is considered as a fund out of which the inhibitor (who all along is supposed to have adjudged) draws *primo loco*, and all the others take the same rank among themselves upon the remainder which formerly they had; and the consequence is, that what the inhibitor gets by his inhibition comes off the last drawer, who is affected by the inhibition; and, if the part falling to such creditor, does not satisfy the inhibitor, he takes next off the penult creditor, and so upwards, in the reverse order of the ranking.

And it makes no difference in the question, that some of these creditors may have been ranked *pari passu* with each other, which happens to be the case here, and must always be the case of more infesters, who, though prior in point of time to each other, yet are infesters on different subjects, and therefore, in the sense of law, neither prior nor posterior to each other; I say, it makes no difference in the question other than this, that as in the ranking they draw proportionally, so they bear the loss proportionally occasioned by the inhibition: And in that, or the like case only it is, where two or more creditors, who are struck at by the inhibition, are ranked *pari passu*, that the loss occasioned by the inhibition is, as to them, allocated proportionally; for, as they are ranked *pari passu*, each must bear his proportion of the loss; as the inhibitor has no further interest than to be fully paid, nor power to disturb the order of the ranking, further than is necessary to obtain his own payment; and, the law will not allow him *in emulationem*, to take any more from one creditor who is in *pari casu* with another, than his just proportion. And, would it not be a strange consequence, that, because the allocation of the loss is proportional on creditors who have a *pari passu* preference, therefore it should also be pro-

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portional between two creditors, one of whom has, in the ranking, a preference to the other?

And as to the practice, which was admitted to have frequently gone agreeable to the manner in which the present scheme is formed, there were other instances condescended on, besides that of the creditors of Galston above mentioned, wherein the schemes were framed as they always ought to be, laying the loss occasioned by the inhibition upon those struck at by it, who were the last drawers. Thus, in the second scheme of division of the price of Mr William Stirling's lands approved in February 1743, both interlocutor and scheme exempted one debt posterior to the inhibition from suffering by what the inhibitor was to draw, because the inhibitor got his full payment off other debts posterior to that debt in point of ranking: But the truth of the matter was said to be, that the practice in either shape has been no other than a practice resting upon the interlocutors of Ordinary's, not objected to by parties concerned, often for not understanding their own interest, and which was right or wrong, according as more or less accurate schemers happened to be employed, which leaves it entire, now that the matter is litigated, to have judgment given agreeable to principles.

And whereas, it had been *urged* in the answers, that as every creditor whom the inhibitor might attack, was entitled to ask an assignation, and, if one be entitled to it, another is no less so, which occasions a circle no otherways to be extricated than by a proportional allocation of the loss on the whole; besides, the reply to this, in effect already made, that the inhibitor has it not in his power to attack whom he pleases, nor is the postponed creditor entitled to demand such assignation, it was further *replied*, that supposing the postponed creditor to obtain such assignation upon paying the inhibitor, it would not alter the case; for still the preferable infetter would not allow him to possess or draw upon his postponed infetment, and if he drew upon the inhibitor's interest, the matter just returned where it was.

THE LORDS having considered the scheme of division, and above debate, found, ' That the inhibition being prior to, and therefore affecting all the annualrent-rights, the deficiency arising from the shortcoming of the funds does not affect equally or *pro rata* all the annualrenters, who stand preferred the one to the other, but must affect the last; and remitted to the Ordinary to direct the scheme of division accordingly.'

Kilkerran, (COMPETITION.) No 5. p. 138.

1748. November 2.

Dame HELEN ERSKINE, Relict of SIR WILLIAM DOUGLAS of Kelhead, *against* WALLACE, and Others, arresting Creditors of SIR JOHN DOUGLAS.

Two troops of St George's dragoons being grazed during the Summer 1746 in the inclosures of Kelhead belonging to Sir John Douglas, several arrestments by Sir John's creditors were laid in the hands of the officers, in order to affect the grass-mail. The regiment being removed, the officers consigned the grass-mail, amounting to L. 180 Sterling, into the hands of Mr Fergusson of Craigdarroch the Sheriff-depute, to be made furthcoming to those having best right; and other arrestments having been used thereafter in Mr Fergusson's hand, he called the whole in a multiple-poin ding.

In this process, compearance was made for said Lady Douglas, who produced her infestment for a yearly annuity of 2000 merks out of the lands of Kelhead, whereof the said inclosures were a part, and thereon pleaded to be preferred to the arresters.

Accordingly, THE LORDS found, 'her preferable upon her liferent-annuity to the arresters.'

Of old, annualrents had no effect but by poin ding of the ground, *vide* Gray *contra* Graham, No 1. p. 565.; but now, since Guthrie *contra* the Earl of Galloway, No 4. p. 567., they have been found to be sufficient titles against all intromitters with the rents personally. *Vid.* Stair, *tit. Infestments of Annualrent*, § 13. and the decision observed by Dirleton, 20th December 1676, Ker *contra* Hunter, No 6. p. 569.

Kilkerran, (ANNUALRENT, INFESTMENT OF.) No 1. p. 30.

No 102.

In a competition between arresters and an annual-renter; the annual-renter preferred upon her annual-rent-right, without doing diligence.

1750. June 16. HORSBURGH of that Ilk *against* HENRY DAVIDSON.

THOMAS CRANSTON of Birkhillside, being debtor to Horsburgh of that Ilk by bond, was inhibit by him; after which he granted first an heritable bond to Henry Davidson tenant in Mowhaugh, who was infest; and then an heritable bond of corroboration, accumulating the interest due to Horsburgh, who was also infest; and adjudged upon it, without mentioning in his decret, his original bond.

Other creditors adjudged, and they were ranked on the debtor's estate, Henry Davidson *primo*, and Horsburgh *secundo loco*; and the other adjudgers fell without the price.

In making up the scheme of division, *pleaded* for Horsburgh, he must draw from Davidson, ranked before him on his infestment, upon a debt struck at by his inhibition, his debt, in so far as secured by the said inhibition.

Pleaded for Davidson, Horsburgh's heritable bond, on which he led his adjudication, is not secured by the inhibition; consequently he cannot, upon it,

No 103.

A person inhibited granted an heritable bond to another creditor, and then an heritable bond of corroboration, accumulating interest, to the inhibitor, who adjudged thereon. The inhibitor was preferred on his first bond; after him the annual-renter; then the inhibitor for the accumulations in his bond of corroboration.

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draw any thing from Davidson, who is ranked before him : His adjudication on which he is ranked, and can only draw, does not proceed upon his original bond ; and if he should pretend that his bond is secured, on which he may adjudge, such adjudication could draw nothing, as being excluded by the other adjudgers, with whom it could not be brought in *pari passu* ; and consequently could be no ground of reduction *ex capite inhibitionis*, the debt contracted, *spreta inhibitione*, being of no prejudice to a security which could not draw. A debtor, by bond, being inhibited, and afterwards granting a bond of corroboration, on which the creditor adjudged, it was found the bond of corroboration, and adjudication upon it, could not be supported against the inhibition by the original bond, Fountainhall, v. 1. p. 706. 29th January 1696, Wilson and Logan Penman, *voce* INHIBITION.

Replied, If it were necessary for Horsburgh to adjudge again on his first bond, such adjudication would be effectual to reduce Davidson's bond on the inhibition ; for the other adjudications, which are themselves excluded by infeftments, cannot be brought into consideration, to hinder him from drawing ; but, without this necessity, the inhibition secured the debt on which he was infeft, and has adjudged.

Duplied, An inhibition does not secure a ground of debt, but the bond, decret or process on which it is led.

THE LORDS, 5th June, found that Henry Davidson could make no use of his infeftment, to the prejudice of the bond on which the inhibition was led : and therefore that Horsburgh was preferable to, and behoved to draw back from Davidson the principal sum and interest contained in the bond on which the inhibition was led ; and appointed the scheme of division of the price to be made out accordingly : and this day refused a bill, and adhered with this explication, that Horsburgh behoved to be paid first the sums due upon his first bond ; that Davidson behoved to be paid after him upon his infeftment ; and Horsburgh *tertio loco* on his bond of corroboration and infeftment.

Reporter, Menzie.

Act. H. Home.

Alt. Fergusson.

Clerk, Forbes.

Fol. Dic. v. 3. p. 154. D. Falconer, v. 2. No 139. p. 163.

No 104.

A disposition in security, and assignation to the rents of lands, followed by infeftment, found preferable to an arrestment of these rents.

1780. July 13. DR ALEXANDER WEBSTER *against* HAY DONALDSON.

MR WALKER of Saintford granted to Dr Webster an heritable bond over his estate for L. 2000, containing an assignation to the mails and duties, on which the Doctor was infeft, but did not enter into possession, nor intimate the assignation to the tenants.

Another creditor of Mr Walker's was Donaldson, to whom he owed L. 500 by a personal bond, and who used arrestments in the hands of his tenants.

In a process of multiple-poining, a competition ensued between Webster and Donaldson; the one claiming a preference upon his heritable right, the other on the arrestments used by him.

Pleaded for the heritable creditor: The design of this disposition in security, and assignation to the rents of the debtor's lands, was, agreeably to the nature of such a right, to give the creditor a preferable title to the lands for security of the sum lent, and to the rents of them for security of the interest, as it should become due upon that principal sum. This security having been completed by infeftment, which likewise serves the purpose of intimating the assignation, must be effectual; November 2. 1748, Creditors of Kelhead *contra* Lady Kelhead, No 102. p. 2901. It is true, the property of the lands cannot be attached but by adjudication, so as to be applied for payment of the principal sum by sale or otherwise; nor can the rents be *brevi manu* levied from the tenants, if they refuse to pay, without a process of mails and duties, or of poining the ground. But by neither of these processes is the creditor's right rendered more complete in itself, than before. It is only carried into execution, as the proprietor's own right would be in the same situation; for neither could he *brevi manu* compel payment: and the annualrenter is as well entitled as he to receive voluntary payment.

Answered for the arrester: The right in security, apart from the assignation to the mails and duties, confers no power of levying the rents; Stair, b. 2. tit. 10. § 1. Nor can this assignation be now effectual, as it neither has been intimated, nor has the creditor been in possession; Gray *contra* Graham, No 1. p. 565. Nay, though the assignation had been intimated, it could not avail the creditor; Erskine, b. 3. tit. 5. § 5.

Besides, the rents attached by the arrestments are due for crop 1778; and as the creditor's annualrents for that year are already paid, the rents of the lands for the same year have been disburdened of them.

The Court considered the infeftment on the heritable bond as equal to an intimation of the assignation to the mails and duties; and that the heritable creditor was preferable to the arrester, not only for the annualrents, but for his principal sum also.

Accordingly, though some of the Judges thought there ought to be a distinction on account of the interest for the year, the rents of which were arrested, being already paid, this idea was in general disregarded.

THE LORDS found the heritable creditor preferable on the rents *in medio*.

Lord Ordinary, *Monboddie*.

For Arrester, *Elphinstor*.

For Heritable Creditor, *H. Erskine*.

Clerk, *Orme*.

Fol. Dic. v. 3. p. 152. Fac. Col. No 114. p. 213.

1796. February 16.

ANNE and MARGARET BAYNES, Heirs-portioners of THOMAS RUTHVEN, and their HUSBANDS, for their interest, *against* COLONEL THOMAS GRAHAM.

No 105.

In a competition arising in a multiple-poining between an arrestment on a depending action, in which the pursuer afterwards obtained decree, against which an appeal was in dependence, and two posterior arrestments, the one on a bill, and the other on a decree, the users of the two last found not entitled to a decree of preference over the funds arrested, which were ordered to remain *in medio* till the discussion of the appeal.

ANDREW STRAITON held a farm belonging to Colonel Graham, on a lease, by which an additional rent was stipulated for every acre the tenant should have in tillage beyond a certain number.

Colonel Graham brought an action against him for exceeding the given number; and, on its dependence, in January 1790, used an arrestment in the hands of David Kinloch, a debtor of Straiton.

In August 1790, Thomas Ruthven, a creditor of Straiton, by bill, likewise arrested in the hands of Kinloch; and in 1793, Anne and Margaret Baynes, heirs of Ruthven, constituted, by decree, another debt due to him by Straiton, and used a second arrestment in Kinloch's hands.

In the action at Colonel Graham's instance against Straiton, THE COURT, in May 1794, 'found the defender liable for the additional rents stipulated in the lease, and remitted to the Lord Ordinary to ascertain the extent thereof.'

Against this judgment Straiton appealed to the House of Lords.

Before the appeal was discussed, a multiple-poining was brought in the name of Kinloch, in which Anne and Margaret Baynes contended, that the arrestments used at Ruthven's and their instance, although posterior to Colonel Graham's, were preferable to it, in respect that it proceeded on a depending action, on which a decree for a liquidated sum had not been obtained; and

Pleaded: An arrestment is of itself merely a prohibitory, and consequently an incomplete species of diligence. It is the decree of furthcoming which transfers the property to the arrester; Stair, b. 3. tit. 1. § 42. An action of furthcoming cannot, however, be brought on an arrestment which proceeds on a depending action, till an extracted decree for a liquidated sum be obtained in it. But Colonel Graham has obtained no such decree. On the contrary, even the general finding of the Court in his favour may be altered by the House of Peers, and cannot therefore prevent the complete diligence of other creditors from having immediate effect. As a posterior arrestment on a debt presently due, is preferable to a prior one proceeding on a debt *in diem*; Ersk. b. 3. tit. 6. § 18. and 21.; Watkins against Wilkie, No. 170. p. 820.; Charters against Neilson, No 157. p. 811.; so, *a fortiori*, ought the arrestments of Mr Ruthven and his heirs to be preferred to that of Colonel Graham.

Before Colonel Graham appeared in the multiple-poining, the Lord Ordinary had preferred Margaret and Anne Baynes to the funds *in medio*; but on the production of his interest, his Lordship found, 'That before Margaret and Anne Baynes, and their Husbands, can draw in consequence of the preference they have obtained in the multiple-poining by the former interlocutor, they must find caution to make the money furthcoming to Colonel Graham, when-

ver his claim against Andrew Straiton shall be ultimately ascertained in his favour.'

No 105.

On advising a reclaiming petition for Margaret and Anne Baynes, against this interlocutor, it was

Observed on the Bench : As the extent of Colonel Graham's debt would have been long since settled, had it not been for Straiton's appeal, it is that circumstance alone which prevents him from obtaining a decree of preference in the multiple-pounding. But, as the appeal unavoidably stops that action as to him, equity requires that his competitors should not be allowed to proceed in it. If they were, the precedent would be dangerous ; as, on many occasions, it would give rise to collusion and undue advantage.

THE LORDS found, that the funds arrested must remain *in medio* till the discussion of the appeal†.

Lord Ordinary, *Ankerville*.
R. D.

For the Petitioner, *Dickson*.

Clerk, *Sinclair*.

Fac. Col. No 203. p. 485.

1797. May 24.

JOHN BUCHAN, Trustee for the Creditors of ROBERT GORDON, *against* The Reverend ROBERT FARQUHARSON.

ROBERT GORDON, on the 28th June 1788, assigned a personal bond to the Reverend Robert Farquharson.

Gordon's estate was sequestrated on the 19th July following, and on the 4th August, the assignation was intimated by Mr Farquharson to the debtor in the bond, before the estate was vested in the trustee for the creditors, either by disposition from the bankrupt or an act of the Court.

John Buchan, the trustee, afterwards brought a reduction of the assignation ; *inter alia*, because, it was not intimated till after the sequestration.

Lord Dreghorn, Ordinary, reduced the assignation.

THE COURT, (9th December 1795,) 'repelled the objection to the want of intimation,' and remitted the cause to the Lord Ordinary.'

This interlocutor was pronounced, partly upon the ground that the trustee was bound to take the subject *tantum et tale*, as it stood in the person of the bankrupt, and consequently under burden of the assignation.

A petition having been presented against this interlocutor, doubts were expressed of its being well founded ; but the petition was, (15th January 1796,) refused, 'as incompetent, being without the reclaiming days.'

† The reporter understands this to have been the judgment of the Court ; but he has not been able to see the interlocutor in the record. See APPENDIX.

No 106.

A creditor, claiming on an assignation to a personal bond, granted before the sequestration of the cedent, but intimated after it, preferred to the trustee for his creditors, because the intimation was prior to the vesting of the estate of the bankrupt in the trustee.

No 106. The trustee then brought a reduction of the interlocutor, 9th December 1795, which was likewise remitted to the Lord Ordinary.

His Lordship ordered informations on both causes.

THE COURT, from certain specialties in the case, and without meaning to infringe the general rule, that a reduction is incompetent wherever a petition before extract would be so, were of opinion, that the objection in point of form was ill-founded.

On the merits, the pursuer

Pleaded ; In competitions between voluntary and legal assignations of an heritable subject, the right first completed by infestment is preferred ; 22d June 1737, Bell against Gartshore, No 80. p. 2848. ; 13th February 1781, Mitchels against Ferguson *vide* PERSONAL and REAL ; 31st January 1792, Russell and Ross against Creditors of Ross, *IBIDEM* ; the same principle holds in an assignation of moveables ; consequently, in this case, the right of the trustee under the sequestration, which being a judicial act, needs not be intimated, is preferable to that of the defender, which was not intimated till after its date.

If, instead of a sequestration, an arrestment had been used of the same date, the arresting creditor would have been preferred to the defender. But the bankrupt act declares arrestments and poindings incompetent after the date of the sequestration ; and it would be singular if an assignation, which would have been postponed to them at common law, should be preferred to a judicial act, by which they are excluded.

Answered ; It is not the sequestration, but the disposition afterwards granted by the bankrupt, or the act of the Court vesting his estate in the trustee, which divests the bankrupt of his property, 23d Geo. III. c. 18. § 19. For the statute requires him to grant a disposition to the trustee, which would, on the contrary supposition, be unnecessary. Indeed, it is expressly declared, by § 13. that the sequestration in heritable subjects shall merely have the effect of an inhibition ; consequently it could not prevent infestment being taken upon a disposition previously granted by the bankrupt ; nor upon the same principle can it prevent the competency of intimating a previous assignation.

Observed on the Bench ; The trustee on a bankrupt estate will be preferred to the creditor claiming on a voluntary disposition, granted before the sequestration, if the right of the trustee be first completed. And therefore, the propriety of the decision, 8th December 1795, Taylor and Smith against Marshall,* in so far as it went upon the supposition, that the trustee in such case is bound to make good the previous voluntary disposition, may be doubted. But, on the other hand, the mere act of sequestration, while it disables the bankrupt from disposing of his property voluntarily, does not at common law prevent a creditor from completing his right by legal diligence, or by any act independent of the consent of the debtor, such as intimating a previous assignation. The incompe-

* Not reported: See APPENDIX.

tency of arrestments and poindings, arises] entirely from the enactment of the statute. No 106.

THE LORDS, ' in respect of the assignation challenged being completed by intimation prior to the disposition from the bankrupt, vesting the estate in the trustee, assoilzied from the reduction so far as regarded that ground of challenge.'

Lord Ordinary, *Armadales*.
Clerk, *Colquhoun*.

Act. *M. Ross, Ar. Campbell*.

Alt. *Geo. Fergusson*.

D. D.

Fac. Col. No 28. p. 66.

Competition, porteurs of bills with other creditors. *See BILL of EXCHANGE.*

Donatars of escheat with creditors. *See ESCHEAT.*

Disposition with a posterior gratuitous disposition of the same subject, clothed with infestment. *See BANKRUPT.*

Base infestment with other rights. *See BASE INFESTMENT.*

Tacks with other rights. *See TACKS.*

Annualrents with adjudgers *in mora*. *See LITIGIOUS.*

See Creditors of Marshall against Hamilton, No 9. p. 47. & 48.

See APPENDIX.

APPENDIX.

PART I.

COMPETITION.

1800. May 20.

SAMUEL HAWKINS, and Others, Personal Creditors of the late John, Earl of Glencairn, against SIMON TAYLOR, and Others, Trustees of William Cunningham Cunningham Graham.

THE estate of Finlaystone, which belonged to the late John Earl of Glencairn, was strictly entailed, but was burdened with an heritable debt of the entailor's, to the amount of £867. 5s. 3d. which came to be vested in the person of the Countess of Glencairn, Earl John's mother.

Earl John contracted large personal debts; for payment of which his creditors attached the rents of Finlaystone, by arrestments in the hands of the tenants, and of the factor on the estate.

A multiplepounding was brought by these creditors in the name of the arrestees; in which the Lord Ordinary appointed a factor to levy the arrested rents, to the amount of £1816. 11s. 9d. The Countess also used arrestments; and, as an heritable creditor on the estate, she brought a process of mails and duties against the tenants; which was conjoined with the multiplepounding.

Earl John died in 1796, and in 1797 William Cunningham Cunningham Graham succeeded, on the death of his father, to the estate of Finlaystone. At this time his affairs were under trust; and his trustees having purchased from the Countess the heritable debt on the estate of Finlaystone, they claimed a preference over the rents *in medio*, not only for the interest of the heritable debt which had fallen due during Earl John's possession of the estate, but also for the principal sum.

The Earl's personal creditors admitted the preference as to the interest, but disputed it as to the principal sum; and

No. 1.

If an heritable creditor on an entailed estate, insist on drawing payment of the principal sums due to him out of rents which have been arrested by the personal creditors of the heir in possession, he is bound to assign to them his heritable security, to an amount equal to that part of his principal sum which has been paid out of the arrested rents.

No. 1.

Pleaded : As the debt was acquired by Mr. Graham's trustees, after the conjoined actions were in Court, the trustees can stand in no better situation than the Countess of Glencairn, their cedent. Now as the heritable debt is admitted to be secured over the whole tailzied estate, she could have no interest in drawing her payment of the principal out of the arrested rents, seeing that not only all future rents, but the soil itself stood impledged for her payment ; and it is a rule of equity, that a catholic creditor cannot act emulously, by drawing payment in a manner, which, without benefiting himself, would injure the interest of co-creditors ; Ersk. B. 2. Tit. 12. § 66. Dict. *voce*. DEBTOR AND CREDITOR.

Besides, before the Countess brought the action of mails and duties, the rents were in the hands of the judicial factor appointed by the Lord Ordinary ; by which means they were so separated from the estate, that they could not be attached by that process, or fall under her heritable security ; and, in virtue of her arrestments, she can come in only *pari passu* with the personal creditors.

At all events, even supposing the Countess to have a preference over the funds *in medio*, she cannot exert it to the prejudice of the personal creditors, without being obliged to assign to them her heritable security, in order that they may operate their relief from the entailed estate.

Answered : The circumstance of the trustee having acquired the heritable security *pendente lite*, will not preclude them from deriving the same benefit from it, as if it had been acquired before the litigation commenced ; 19th Jan. 1757, Earl of Buchan against his Father's Creditors, No. 36. p. 15406.

An heritable creditor, in virtue of the assignation to the mails and duties contained in his security, is preferable on the rents both for his principal sum and interest, to any diligence done by personal creditors ; 13th July 1780, Webster against Donaldson, No. 104. p. 2902. And the rule of equity, by which a catholic creditor cannot draw his payment so as to injure secondary creditors, is applicable only to cases where he can assign without injuring himself. But even if the heritable debt had remained with the Countess, she had an obvious interest in seeking her payment out of the first and readiest of the rents ; and, if she had done so, the law would not have allowed her to assign her security to the prejudice of the heir of entail ; case of the Earl of Buchan, 1st December 1738, mentioned in the report, *sup. cit.* 19th January 1757, Earl of Buchan against his Father's Creditors. And as the heritable debt is now in effect vested in the heir of entail himself, he has a still stronger interest that it should be extinguished by the rents *in medio*, in place of remaining a burden on the estate.

Further, the equitable maxims pleaded by the personal creditors, apply only where there are two distinct subjects, out of either of which the catholic creditor may operate his payment. But in this case there is truly but one subject ; for the estate itself, and the rents arising from it, admit not of being separated ; nor is the question affected by the circumstance of these rents having been up-

lifted by the judicial factor, before Mr. Grahame's trustees made their claim ; for this step having been taken merely for the sake of preserving the rents, they must be held in legal construction to be still in the hands of the tenants. No. 1.

The Lord Ordinary found, " That the trustees of William Cunningham Cunningham Graham, in virtue of their heritable right and infeftment, are entitled to rank upon the bygone rents of the estate of Finlaystone in preference to the arresting creditors, both for the principal sum and interest due to them ; and that the said trustees are not bound, on drawing payment, to assign in favour of these creditors."

The personal creditors presented a reclaiming petition, on advising which with answers, it was

Observed on the Bench : Mr. Graham's trustees cannot plead their cause higher than the Countess of Glencairn could have done, had the heritable right remained in her person. Now, it is a settled rule with regard to the debt of an entailer, that the heir in possession must keep down the interest ; but that he is not bound to pay any part of the principal sum, without obtaining an assignation from the creditor, so as to enable him to keep it up against the estate. In the present instance, the arresting creditors are in a still more favourable situation than the heir ; and therefore if Mr. Graham's trustees demand their payment out of the arrested funds, they must so far assign their heritable security to the competing creditors.

The Lords unanimously found, " That the trustees of William Cunningham Cunningham Graham are preferable on the sum *in medio* for the interest due on the principal sum, but not for the principal sum itself ; and therefore in so far altered the interlocutor of the Lord Ordinary reclaimed against, and remitted to his Lordship to proceed accordingly.

Lord Ordinary, *Graig.*
Alt. H. Erskine.

For Mr. Graham's Trustees, *D. Cathcart.*
 Clerk, *Home.*

R. D.

Fac. Coll. No. 181. p. 415.

1803. December 13.

CREDITORS of ALEXANDER ROBERTSON, *against* CREDITORS of WILLIAM ROBERTSON.

WILLIAM MASON (4th February 1772) executed a conveyance of the lands of Dalry, in favour of his eldest daughter, " Janet Mason *alias* Robertson, and Alexander Robertson her husband, their heirs, executors and assignees whatsoever, heritably and irredeemably."

No 2.

An heritable debt specially secured upon one of three estates, of which the

No. 2.
debtor was
proprietor,
must be paid
out of it,
without re-
lief from the
other estates,
when the suc-
cession has
been divided
between two
heirs of line.

By a decision of the Court, it was found, that the fee of the lands was vested in Mrs. Robertson, and not in her husband.

Of the same date, (4th February), Mason executed his last will, nominating Alexander Robertson his sole executor, bequeathing to him his whole personal estate, burdened with certain provisions to his three younger daughters.

Alexander Robertson, in his own right, was proprietor of the lands of Giffin, of a house in Edinburgh, and an heritable bond of £1450.

Robertson, in lieu of the provision he was bound to pay to Ann Mason, one of the daughters, granted her a bond (4th February 1777) for an annuity of £40. over the lands of Giffin, on which she was infeft. A similar transaction was made with Elizabeth Mason, another of the daughters, who accepted of an annuity of £30. secured on the lands of Dalry.

Robertson died in September 1779, leaving a son, William, besides other children, having previously (13th September 1777) executed a will in the English form, bequeathing his whole estate, real and personal, to his spouse, who, upon this title, entered into possession of the whole, uplifting the rents and interests due from the various subjects which belonged to him.

William Robertson having (14th June 1786) served heir in general to his father, brought a reduction of the settlement, so far as it respected the heritable property in Scotland.

He completed his title to the heritable bond, (4th December 1787), by being infeft on a precept of *clare constat*. He also obtained a precept of *clare constat*, and a charter of confirmation of the lands of Giffin, but died before infeftment was taken,

He made up no title to the other subjects.

After his death his creditors raised processes of constitution against Alexander, his son and heir; and upon his producing a renunciation, they obtained decrees *cognitionis causâ*, and adjudications against the *hereditas jacens* of William. They also insisted in the action of reduction, when the Court found, (9th December 1795), "That the last will, executed after the English form, cannot effectually convey an heritable property in Scotland."

Adjudications were also led at the instance of Ann and Elizabeth Mason, and others, creditors of Alexander Robertson, senior. Processes of ranking and sale were brought of the whole property belonging either to him or to his son William. The whole was sold, and the price *in medio* was to be divided among the creditors, according to their rights. A dispute occurred in the ranking respecting the fund from which the annuity of Ann Mason was to be paid. The rents of Giffin amounting only to £20. the remainder of the annuity had been paid by Mrs. Robertson, now looked upon as factor for her son, from her intromissions with his other estates. In the accounting between her creditors and his creditors, the former were charged with £20. annually as the rent of Giffin during William's life; and as an article of discharge in their favour,

was stated the annuity of £40 during the same period paid out of the general intromissions.

The creditors of William objected to this, and insisted that the excess of the annuity above the rents of Giffin should be a burden upon the price of Giffin; in support of which they

Pleaded: The only subject which was feudally vested in William's person was the heritable bond, although he was also entitled to the whole succession of his father. The remaining subjects being *in hereditate jacente* of Alexander Robertson, *senior*, are descendible to Alexander, *junior*, as heir of line to his grandfather. The heritable succession, then, of Alexander, *senior*, has been divided, part being taken up by his son as heir of line, and part by his grandson in the same character. While the creditors have both successions bound to them *in solidum*, in a question betwixt the heirs themselves, the ultimate payment of the debts must be divided *pro rata*, according to the value of the subjects that descend to each. Their separate creditors, deriving right from them, are exactly in the same situation in their mutual claim for relief. When the succession is divided by the act of the law, as among heirs-portioners, the same rule is adopted. It was adopted also as the rule between an heir of line and heir-male, Rose against Rose, 17th January 1786, No. 22. p. 5229. Again, the creditors of William would not only be entitled to a relief from the other funds of his father, in all cases of general debts having no particular reference to any special subject; but they are here entitled to a total relief, as the annuity is expressly laid upon the lands of Giffin. These lands, so burdened, must be taken by the heir who succeeds under this burden; and when he pays the debt, he must pay it without any relief; Stair, B. 3. Tit. 5. § 17; Ersk. B. 3. Tit. 8. § 52.

The creditors of Alexander

Answered: The creditor in the bond of annuity had a double remedy for obtaining payment; the heritable security over the lands of Giffin on the one hand, and the personal obligation against the debtor and his heirs on the other. Now, William Robertson was the sole heir of the granter, entitled to take up the whole succession. There was thus no person to divide the responsibility with him, and against whom any claim of relief could be competent. The debt, then, was paid by the proper debtor, who at the time of payment was not entitled to the benefit of discussion or claim of relief. The debt, therefore, is extinguished, so that it cannot afterwards be revived to any effect whatever.

It is true, that those who take an heritable estate, must take it with all the burdens affecting it. But the burden affecting Giffin is already, *pro tanto*, extinguished by the payment made by the proper debtor; so that when Alexander Robertson *junior* comes to take up the fee of this estate, or the creditors of the grandfather do so, they take it effectually disburdened of the bygone annuities, so far as already paid out of other funds belonging to the debtor.

No. 2. The Lord Ordinary (14th May 1799) "found, That as the annuity payable
 " to Ann Mason was heritably secured by Alexander Robertson on his lands
 " of Giffin, exceeding the amount of the rents thereof; and as credit is claimed
 " and allowed to William Robertson's creditors for the whole of those rents
 " during his surviving his father, whom he must be held to have represented,
 " and even down to his mother Janet Mason's death; her creditors or repre-
 " sentatives are entitled to take credit, in accounting with William's creditors,
 " for the said annuities, in so far as the same were paid by her to the said Ann
 " Mason."

The creditors of William petitioned the Court, when it was found, (25th
 May 1803), "That the bygone annuities due to Ann Mason, secured upon the
 " lands of Giffin, fall to be charged upon the price of these lands in the first
 " place; and with this explanation, adhere to the interlocutor of the Lord
 " Ordinary, and remit to his Lordship to proceed accordingly."

Upon again advising a petition, with answers thereto, the Court (13th
 December 1803) "found, That the bygone annuities due on Alexander Robert-
 " son and his wife's bond to Ann Mason at and subsequent to the death of
 " Alexander Robertson, so far as they exceed the rents of Giffin for the same
 " period, fall to be charged upon the price of the lands of Giffin, as a prefera-
 " ble debt thereon, in respect that the annuity was secured by heritable bond
 " and infestment upon that particular subject; and with this explanation adhere
 " to the former interlocutor."

Lord Justice-Clerk, *Esqgrove*.

For William's Creditors, *Solicitor-General Blair*.

Agent, *Ja. Thomson, W. S.*

Alt. *George Jos. Bell*.

Agent, *Wm. Mollie, W. S.*

Clerk, *Hans*.

F.

Fac. Coll. No. 129. p. 285.

1807. November 19. JEAN M'LURE, and Others, against WILLIAM BAIRD:

No. 3.
 If a creditor
 use an inhibi-
 tion against
 his debtor,
 and if, after
 the inhibition,
 but before
 any diligence
 used by any
 other creditor
 to affect it, an
 heritable sub-
 ject belong-
 ing to his
 debtor be sold
 by voluntary
 sale, then the

JAMES REYBURN was proprietor of a small tenement in Wallacetown. He
 owed £100. to David Cumming, and various sums to other creditors. Cum-
 ming raised letters of inhibition against Reyburn on the debt due to him, which
 were regularly executed and recorded on the 2d May 1775. No other creditor
 did any diligence against Reyburn's estate. In this situation, Reyburn soon
 after sold the tenement to William Baird, who then held it as tenant for rent.
 Cumming went abroad in the naval service. His wife, Jean M'Lure, having in
 vain endeavoured to get payment of the debt due to her husband, at last raised,
 in his name, an action of constitution of this debt, in which she obtained decree,
 and afterward an action for reduction of the sale on the inhibition, concluding
 also for payment of the rents. She obtained decree in this action also, extract-
 ed it, and thereon charged Baird, who presented a bill of suspension, and after-

ward brought a reduction reductive of the former proceedings, in which a long and intricate litigation took place. While this depended, an adjudication was led in name of Cumming, whose remaining in life began to be uncertain; and on the other part, Baird got an assignation to the other debts due by Reyburn, and thereon likewise raised an adjudication, within year and day of the adjudication in Cumming's name. A judicial factor was appointed on the estate of Cumming, who was at last ascertained to be dead; and his wife and children sisted themselves in the proceedings above-mentioned instead of him. In the action of reduction reductive the defenders were assolzied, and the inhibition found good.

No. 3.
inhibiting
creditor will
have a pre-
ferable claim
upon the
price of that
subject, in
virtue of his
inhibition.

The question then, 1st, As to the tenement itself,—2dly, As to the rents since the time of the sale,—took this shape. Jean M'Lure and the children of Cumming claimed the estate, on the inhibition and adjudication in name of Cumming. They also claimed the rents on the inhibition, from the time of the sale, or at least from the time of the decree of reduction; and on their adjudication from the date of it.

Baird maintained, that the adjudication in name of Cumming was void as being led without any authority from him, and that an inhibition alone gave no right to either land or rents, so that they were both carried by his own adjudication, which was the only valid one.

The Lord Ordinary, (29th May 1804) to whom the cause had been remitted, found, "That the inhibition executed by David Cumming in the year 1774, remained latent till the year 1796, and that this negative or prohibitory diligence could create no preference on the rents from the date of the disposition to Baird in the year 1794, prior to the adjudication led in the name of David Cumming in the year 1800, and that Baird is not liable to account for said rents: And in respect that the principles adopted by the Court with regard to the action brought by Jean Maclure, and the authority under which she was understood to have acted, may be considered as sufficient to support the adjudication led by her in his name; and as Baird's adjudication was within year and day thereof, finds these adjudications are come *in pari passu*, and decerns."

On a representation for Baird, his Lordship's interlocutor was: "In respect the adjudication upon which the respondents found in the present competition, was led in the name of David Cumming alone, though out of the country, without mention of his wife or any other person, as his attorney, finds said adjudication cannot be preferred *in pari passu* along with the representer's adjudication regularly deduced; therefore finds the representer preferable upon the rents which fell due subsequent to Cumming's adjudication; so far alters the interlocutor represented against, and decerns."

The cause came into the Inner-House by petition against these interlocutors, with answers. A variety of arguments are contained in these papers, which it is not necessary to report.

No. 3.

On advising the cause, the Lord President observed, That the points on which this cause depends had been decided so long ago as the year 1777, in the case of *Monro of Pointzfield*, on a solemn hearing in presence, a decision of great importance, though unfortunately it is not known, because the decisions for that year are not yet reported. [His Lordship produced the papers in the cause, and notes of the opinions of the Judges, particularly Lord Braxfield and President Dundas.] From these, his Lordship said, it appeared, that in that case there had been an inhibition against the estate of a proprietor of land, who owed other debts besides that to the inhibitor. That after the inhibition, but before any other diligence was done against the estate, it was sold, and then, after the sale, adjudications were led by the creditors who had not inhibited, and a competition ensued. In that case the Court were clear, that the inhibitor was preferable for his debt without any further diligence at all. It was held that the sale rendered all diligence by other creditors against the estate void; because as to them it was a good sale, and conveyed away the property from their debtor. Their only claim it was found must be on the price in the hands of the purchaser. But the inhibiting creditor was entitled to disregard the sale altogether, because as to him it was struck at by his inhibition, therefore he might adjudge the estate. But further, his debt being the only one on which diligence could be done against the estate, without regard to the rights of the purchaser, was equivalent to a real incumbrance on it, which the purchaser was entitled to see cleared off before he paid the price, or to pay off himself with the first end of the price. Adjudication by the inhibitor was therefore, though competent, not necessary, because he was sure of payment out of the price of the estate, in preference to all the other creditors. This was solemnly laid down as law by the Court, and particularly explained by the able judges above named in the above mentioned case, and the same rule of law applies to the present case.

Here there is an inhibition; then a sale; then adjudications by the creditors who had not inhibited, and no doubt also by the inhibitor. This last adjudication may be put out of the case. It is argued to be inept, perhaps it is so; but at all events it is unnecessary; the preference of the inhibitor in no degree depends upon its validity, (especially as it may be renewed in more proper form,) but rests upon the effect of the inhibition combined with that of the sale.

By the inhibition the sale to Baird is reducible as to the inhibitors *Maclure, &c.* Then by the sale all diligence against this tenement by the other creditors of *Reyburn* is void, since the property was carried out of him, by a conveyance valid as to them, before that diligence was executed. The adjudication, therefore, on their debts, is of no effect at all, and can never compete with the inhibitors if they should adjudge even now. This they might do, and their adjudication would still be the only effectual adjudication of this tenement. But it is not necessary for them to do this, because they must be paid in full by the purchaser Baird, who cannot hold the estate, without getting this debt purged

on which the inhibition has been raised. Unless, therefore, Baird is willing to give up the estate to them, he must pay this debt, since the seller Reyburn cannot pay it. He may, no doubt, retain it out of the price, but it must be paid to the inhibitors. Now, as it may be presumed Baird will not give up this estate, it is not necessary to enter into the other points argued in the papers.

No 3.

This view a great majority of the Court adopted; and accordingly the interlocutor of Court (19th November 1807) was: "The Lords alter the said interlocutor, and find that the adjudication led by William Baird is inept, and that the petitioners became preferable creditors on said subjects and rents thereof, from the fifteenth day of June seventeen hundred and ninety-six, the date of the decree of reduction obtained against William Baird, in virtue of the inhibition executed by David Cumming in seventeen hundred and seventy-four, and decreet of adjudication following thereon, to the extent of the debt contained in the said adjudication *."

Lord Ordinary, *Hermant.*Act. *David Douglas.*Alt. *Robt. Corbett.**P. Robertson, and Thos. Grierson, W. S. Agents.**Scott, Clerk.*

M.

Fac. Coll. No. 7. p. 26.

* This form of the interlocutor does not prove that the adjudication was in itself unexceptionable, but the creditors having no interest to object to it, it was no longer challenged by any body, and therefore stood as valid.

M.

*. The case of *Monro of Pointzfield*, alluded to in the above report, and the other cases during that period, which had not formerly been reported, will now be found in this Appendix. See APPENDIX, PART I. *voce* INHIBITION.

CONCURSUS ACTIONUM.

SECT. I.

Where different Actions arise upon the same fact, tending to the same end, the Pursuer cannot insist upon both.

1610 December 13. JOHNSTON *against* CHARTERIS.

IN an action of contravention, pursued by Mr John Johnston against Sir John Charteris of Hempfield, the LORDS found that they would grant no contravention against Hempfield, for uplifting of the mails and duties of the lands, whereupon decret of removing was given against Hempfield; and that because Mr John had obtained a decret of violent profits thereupon, which he might put to execution; and that notwithstanding Mr John was content to renounce his decret of violent profits.

Fol. Dic. v. I. p. 185. Kerse, MS. fol. 232.

* * Haddington reports the same case :

HE who obtained a decret of violent profits, against that man who found him caution of lawburrows, pursued contravention for the defender's wrongous meddling with the profits of his land, albeit he offered to renounce the execution of his decret, so far as may concern the bygone profits; yet the LORDS will not permit him to do it, and to pursue contravention upon that fact, for the which he had a rigorous action of violent profits, whereof he had made election by his former pursuit and decret.

Haddington, MS. No 2049.

No 1.

Where the party had made his election, and taken a decret of violent profits upon ejection, the Lords refused to sustain contravention; and that although the pursuer was content to renounce his decret of violent profits.

1611, November 29. SIR JOHN HEPBURN *against* CARCATTLE.

IN a contravention pursued by Sir Robert Hepburn against Patrick Carcattle, for contravening an act of caution found by him, by the occupation of the lands

No 2.

Found as above.

No 2.

pertaining in property to his umquhile mother, who was wife to the said Sir Robert ;—THE LORDS would not sustain the action of contravention, because Sir Robert, upon warning made to him in his wife's time, having obtained decreet of removing, had his action of violent profits ; and therefore, having an action of that nature, which of the law was [a punishment of violence, the LORDS would not grant contravention.

Fol. Dic. v. I. p. 185. Haddington, MS. No 2322.

No 3.

The Lords sustained a contravention, although the Magistrates of the place, (both parties being burgesses,) had immediately committed the party to prison for the fact ; and this because no satisfaction was decerned by the Magistrates to be given to the complainer.

1623. March 20.

FITHIE against CARMICHAEL.

IN a contravention, Fithie *contra* Carmichael, being both burgesses of Dundee, the fact of contravention being for casting down the pursuer to the ground, and bruising him with his knees and elbows, without any blood or other violence ; —THE LORDS sustained the contravention, notwithstanding it was *alleged* by the defender, That he being convened at the pursuer's instance, for the same fact, before the Bailies of Dundee, they being town burgesses of that burgh, the Bailies had, for that fact, committed him to prison, after trial taken by them, of the matter of the fact ; and so he being once punished therefor, he ought not to be pursued *de novo* at the pursuer's instance ; therefore this allegiance was repelled, because no satisfaction was decerned by the Bailies to be given to the party complainer.

Act. Mowat.

Alt. Russel.

Clerk, Gibson.

Fol. Dic. v. I. p. 185. Durie, p. 59.

No 4

The deed of contravention being ejection, the party has his election whether to insist in an action of ejection or contravention ; for the Lords found, where a party has two actions upon the same fact, he may chuse either ; but if both tend to the same end, whether *ad pœnam* or reparation, chusing the one opposes the other.

1630. February 19.

L. HIDLESTON against MAXWELL.

HIDLESTON pursuing contravention upon this deed, viz. because he was ejected out of his room ; and the defender *alleging*, That seeing the pursuer had an ordinary action of ejection competent to him in law for that deed, for which he pursued contravention ; therefore that contravention should not be sustained. This allegiance was repelled ; for the LORDS found, That where the party had two actions in law, by which, or either of them, he might seek redress for any one deed, that he might pursue in his option either of them, at his pleasure ; but where there are two actions upon one fact, *si utraque tendat ad vindictam, electa una non recurrit ad alteram, quia pœnam petit, et ut injuriens puniatur, nisi et cum injuria damnum datum sit, tum enim post pœnam petitam potest agi ad reparationem damni.*

Fol. Dic. v. I. p. 185. Durie, p. 494.

1709. June 9. AGNES BIRNY *against* JOHN HERIOT in Dirleton.

JOHN HERIOT in Dirleton being tenant to Hamilton of Reidhouse, and Agnes Birny, the Lady, being infeft in a liferent annuity of 1000 merks *per annum* out of these lands, she and Mr Andrew Rule, her second husband, poinded Herriot's corns in October last, for her annuity due for the crop 1708, and upon his making payment disposed the same to him. Captain Hamilton of Reidhouse, the fiar, pretending that Herriot's rents did much more than pay his mother's annuity, seizes upon the tenant's corns, and carries them to his girnells, and sells and disposes on a part of them; whereon Herriot, the tenant, pursues him for a spuilzie before the Justices of peace, who ordained Reidhouse to enact himself not to intromit with, nor dispose upon the victual, till they met again, on the 1st of June; at which day, there being no diet, the tenant advocates the cause to the Lords, and Reidhouse at his own hands seizes on the victual, and sells 50 bolls of it for ready money; whereupon Herriot applies to the Lords by bill, complaining of this unwarrantable intromission; and if he, as an officer of the army, should go off to Flanders, he would be deprived of all remedy and redress; and therefore craved the victual might be secured, both what remains, and what he had masterfully carried away, and be roup'd to the best avail, and the price consigned in some responsal person's hand, to be made furthcoming in the event to the person who shall be found to have best right thereto. *Answered* for Reidhouse, That the tenant's rent was much more than paid his mother's annuity of 1000 merks, and to which surplus he had the only undoubted right; and by his hypothec, as master of the ground, he might not only hinder the tenant to remove the corns off the ground, but intromit therewith, especially seeing there was a standing submission, yet unexpired betwixt them; and that the Justices of the peace did not meet on the 1st of June, was none of his fault; and his mother's collusion with the tenant can never prejudice him, seeing her poinding was precipitant before the term; and the appreciation of the corns was far below the prices then giving, and all contrived to defraud him, the heritor. THE LORDS found, that the master, in right of his hypothecation, had a power of detention of the corns growing on his ground, that they could not be transported elsewhere till he were satisfied or secured; but that he had no power to intromit or dispose thereon, till he had a sentence liquidating his debt; and that he was *in mala fide* to carry them away after he was cited in the spuilzie, and ordained to enact himself to forbear meddling with the corns in the mean time; and directed a commission to Mr. Alexander Hay, and John Hay of Hope, Sheriff-deputes of Haddington, to roup the corns yet remaining, and keep the price for the use and behoof of any that should be found to have interest at discussing of the cause; and for what Reidhouse has summarily intromitted with at his own hand, ordained him

No 5.

In a case of spuilzie, found, that a party was not entitled both to insist for his oath *in litem*, to ascertain damages and violent profits; and to claim the penalty in law burrows.

- No 5. to find caution to make the same furthcoming, if the same shall not be found to belong to him, but the tenant shall instruct ~~he~~ has paid his full rent.

1712. *January 28.*—JOHN HERIOT late tenant to Hamilton of Reidhouse, now in Dirleton, having applied first to the Sheriff, and then to the Justices of the Peace, and lastly to the Lords of Session, for sequestration of his rents, in regard Reidhouse had, under pretence of his hypothec, broke up his barns and girdles, and seized on his corns, he obtained a warrant discharging Reidhouse to intromit, *vide supra* June 9th 1709. Notwithstanding whereof he carried away near 200 bolls of corn, and sold it up and down the country to baxters, brewers, and mealmongers, and uplifted the money, and then departed to Flanders. Whereupon the poor man had no remedy left but to raise a spuilzie against him, and the persons who bought the corn from him, and Robert Sandilands, his cautioner in lawburrows, wherein he was allowed to prove the taking away of his victual, with the quantities and prices: And the probation coming this day to be advised, no compearance was made for Reidhouse, he being abroad, and little to be said for him. But it was *alleged* for Grant and others that had bought the corn, *absolvitor*; for they had bargained with Reidhouse, and made *bona fide* payment before your citation in the spuilzie, and produced discharges. *Answered*, Though there be just ground to suspect the discharges are antedated, yet you were still *in mala fide*, for your payments were after the warrants he had obtained against Reidhouse. *Replied*, These were not intimate to them. THE LORDS found it relevant to put them *in mala fide*, that they knew, before they made payment, of the applications Herriot had made to the Sheriff, &c. to have the corns sequesterate. Then Herriot insisted to have his oath *in litem*, not only on the quantity spuilzied more than he had proven, but likewise on the prices, which is always allowed *in odium spoliantis*, as Spottiswood observes, tit. Spuilzies and Ejections; and Brown *contra* Murray, *voce* OATH, *in litem*; Earl Roxburgh *contra* Langton, No. 2. p. 379. It is true, the witnesses he has adduced have deponed on the prices, but through their ignorance how the markets then ruled, they have condescended on a price far below what victual then gave, so this can never debar him from his oath in so atrocious and black a spuilzie. But the LORDS found he having adduced witnesses on the price, as well as the quantity, and examined them by a particular interrogatory upon the price then giving, he cannot reclaim now, but must stand to the price they have deponed upon, and can seek no more. Then Herriot insisted against Sandilands, the cautioner in the lawburrows, who *alleged*, his case to be most favourable, seeing Reidhouse had turned his back on this business, and so he could expect no relief. *Answered* for Herriot, This gave him a very dismal and melancholy prospect of his recovering payment of such vast quantities of victual robbed from him, and so had the more need to hold Sandilands the cautioner fast; who *alleged* 2do, You can never claim the benefit either of the spuilzie or lawburrows, for the corns were not yours, but the Lady Reid-

No 5.

house's, whose jointure-lands you possessed. *Answered*, It is very true, her annuity was payable out of these lands, and she poulded my corns for the very same: But I redeemed them, and got an assignation from her, so the son had the less pretence to seize his mother's victual. *3tio*, *Alleged*, That, the pursuer cannot claim both the violent profits in the spuilzie, and likewise the penalty in the contravention of the lawburrows; for two penal actions concurring *una consumit alteram*. The party indeed has the election, but he cannot seek both. And Stair, lib. 4. tit. 48. § 9. tells us the Lords are not in use to sustain both penalties. *Answered*, This poor man is in a special case; for *1mo*, He gets not the full price of his corns; *2do*, He loses the annualrent he could have made; *3tio*, The law gives him but the half of the penalty, the other going to the fisk; so he falls but 500 merks, which does not compensate his damage; *4to*, *Alleged* by the cautioner, The sum he is taken bound in of 1000 merks is illegal and exorbitant; for that is the penalty of a freeholder, which Reidhouse is not, never yet infest. *Answered*, The apparent heir, in construction of law, is subject to the same penalty as if he stood infest. *5to*, *Alleged*, Reidhouse must have compensation for what rent the tenant owed him. *Answered*, The Lady liferented these lands, at least the greatest part, and he has satisfied her, and got her right; which demonstrates the great bangistry and oppression he has met with: And Stair, *ubi supra* § 2. thinks where the fact is clothed with atrocious circumstances, by men of violent tempers, the penalty may be increased. That spuilzie *inurit labem realem* and affects the goods; *see Hay contra Leonard, voce PERSONAL and REAL*: Yet *bona fides* will excuse onerous purchasers who knew nothing of the vitiosity. That penal actions may sometimes concur, L. 130 *D. de reg. juris* seems to import. But it wants not its own limitations. The Lords found he could not have both his oath *in litem* on the damages, highest prices and violent profits, and likewise the penalty in the lawburrows; but allowed him the election of any of the two he judged most to his advantage: And repelled the cautioner's defences, and refused to restrict the penalty to 200 merks, (as he craved) which is imposed on an unlanded gentleman: For, though Reidhouse was not infest, yet he was apparent heir to a freeholder who stood infest, and so was liable to the same penalty.

Fol. Dic. v. 1. p. 185. Fountainball, v. 2. p. 501. & 699.

No 6.

A party prosecuted another, as for the crime of fraudulently intromitting with bank notes. He

1712. February 15.

JOHN BUCHANAN, Writer in Edinburgh, against JOHN MENZIES.

IN a process at the instance of John Buchanan against John Menzies, for restitution of some bank notes belonging to the pursuer, which he alleged Mr Menzies had unwarrantably intromitted with;

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No 6.
afterwards
brought an
action for
them, only *ad
civillem effec-
tum*. This
last was sus-
tained, not-
withstanding
of the former.

Alleged for the defender; The pursuer had irregularly, without any process or intimation to the defender, caused sist one John Strachan before a Bailie of Aberdeen, who elicited from him a signed declaration upon oath, of what he knew concerning the defender's having of the notes, and how he came by them; which extrinsic examining and precognoscung in a civil cause, is a ground to assolzie the party against whom that method was taken, and punishable as a practice of pernicious consequence, 14th July 1621, Livingston *contra* Galloway, *voce* IMPROBATION.

THE LORDS repelled the defence; for they thought the practise, 14th July 1621, betwixt Livingston and Galloway ought not to be followed or made a precedent. *Forbes, p. 589.*

* * Fountainhall reports the same case:

JOHN BUCHANAN, servant to Robert Campbell, writer to the signet, having received from his master L. 95 Sterling in bank notes, to deliver to another person; and he meeting with John Menzies, son to Sir William Menzies of Gladstones, and accidentally telling him his errant, being acquainted, they went in to drink, and either they were taken out of his pocket by the said John, or being dropt were found by him. Buchanan, after their parting, missed his notes, and went straight to John Menzies, and enquired if he had seen them, who denied it strongly; whereon they were put in the Gazette in 1708, and a premium offered to the finder. This matter continued dark for a year or two, till Providence ordered it, that one John Strachan, Sir William Menzies's servant, whispered it in some companies, that John Menzies had found the bank-notes thought to have been lost; whereon he is convened before a bailie; and, being examined, declares he heard Mr Menzies say he had found about that time bank-notes to that value. On this discovery, Mr Campbell, Buchanan's master, applied to John Menzies, and his father, who at last confessed his intromission with these notes; but added, that he had sent them back by a gentleman he had employed. This not being instructed, promises were made to repair the damage; but that not being performed, Buchanan applied to the Queen's advocate for a warrant to arrest him; which was done, till he found his brother Thomas caution to produce him; and, after many communings, reparation being shifted, Buchanan raised a process before the Lords, for restitution of his money, and L. 20 Sterling, as his damages. *Alleged*, The matter of this libel is criminal in a high degree; and though it might be likewise the ground of a civil action, yet you have elected to insist criminally, by exhibiting a complaint, to her Majesty's advocate; so no process can now be sustained, till the criminal accusation be first discussed, as clearly prejudicial, and not to be anticipate by this civil process. And which quadrates exactly with the common law, *l. 54. D. de judiciis*, and *l. ult. C. de ordine judiciorum*, where *prius de crimine judicandum quam de civili causa cognoscatur*. 2do, Your libel is most irrelevantly founded on extrajudicial confessions, and other unconcluding circumstances;

and Strachan's examination was contrary to law, the Lords having condemned such precognitions, either in civil or criminal cases, as dangerous and pernicious to ensnare unthinking people, no ways on their guard for such catches; and was so found, Livingston *contra* Galloway, *vero* IMPROBATION; and prohibit by the claim of right, act 18th of the convention of the estates 1689. *Answered*, These defences have more the air of a dilatory trifling, than might have been expected in such a case, where he was deeply concerned, rather to vindicate and exculpate himself from a charge dipping on his reputation, than to procrastinate the plea, and disappoint the pursuer's just demand of his money; a bad requital for his lenity and forbearance. And to the *first*, It is a strange novelty, where a fact complained of produces both a civil and criminal pursuit, the party may not have his choice of the softest method to recover his money: And the very laws cited give this liberty that *utraque actione licet experiri*; and as to the extrajudicial declarations, we are not in that case; for Strachan's was taken *antore pratore*, before a magistrate; and that case out of Durie is old and single, has no second; neither meets the affair in hand, which was to discover a concealment, *ad rimandam veritatem*, and in favours of one who was *in damno vitando*. THE LORDS repelled the dilators, and sustained the process *ad civilem effectum*, to make up the pursuer's loss.

Fol. Dic. v. 1. p. 185. Fountainhall, v. 2. p. 725.

SECT. II.

Where the Conclusions of two Actions are contradictory, the Pursuer cannot Insist in both.

1590. *June.*

HOME against CAIRNCROSS.

WILLIAM HOME, younger brother to the Laird of Coldenknows, pursues the Laird of Mellenstons, to hear and see the tenor of an tack proven, the whilk was sett by the said Laird to the said William, of certain husband lands of sountes; and also, the said William pursewit Nicoll Cairncross, for exhibiting and delivering of the said tack, *alleging* the same to be in his hands. It was *alleged*, That the pursuer could not pursue both the ways, and the two actions were *incompatibilia*. *Answered*, That it was *inter diversas personas, et non eodem modo agendi*. THE LORDS fand be interlocutor, That the pursuer might not pursue both the ways, but behoved to choose *et quod electione unius tollebatur altera*. As the pursuer thereafter pursued for the proving of the tenor.

Fol. Dic. v. 1. p. 185. Colvill, MS. p. 453.

16 Y 2

No 7.

A party intending an action of proving the tenor, and also another action of exhibition and delivery of the same writ against a third person, the Lords found, that altho' it was *cum diversis personis*, yet *electione unius, tollitur altera*.

No 8.

Found as above.

1592. December 20.

GUTHRIE against GUTHRIE.

IN an action pursued by James Guthrie of ———, against Guthrie of Colestoun, for probation of the tenor of a tack, alleged to be made by the Cardinal Abbot of Arbroath to the said James's father, his mother, his eldest brother, and himself, as part and portion of the said lands of Colestoun, &c.; it was *alleged* by the said Guideman of Colestoun, That no process should be granted to the said James, for probation of the said tenor, in respect that he had two other actions depending for the said tack; the one for transuming of the said tack furth of the register of Arbroath, the other for delivery of the same against the said Guthrie of Colestoun and others, alleged having thereof, and so *quando subest spes recuperandi*, the pursuer can never have place to prove the tenor; because this inconvenience might follow, that in proving the tenor, the principal might thereafter be found of a tenor contrary to that which would be proven in this instance. THE LORDS, by their interlocutor, found that the said pursuer would not be heard to pursue this action of the tenor, unless he would renounce the other actions for recovery of the tack itself.

Fol. Dic. v. 1. p. 186. Haddington, MS. No 60.

S E C T. III.

Where the Conclusions of two Actions are only Different, not Contradictory, both may be Insisted in.

1633. July 25.

MITCHEL against LAW and STUARTS.

No 9.

Though a party deformed has pursued criminally, *ad vindictam publicam*, for punishment, he may thereafter pursue civilly for his private interest.

DAVID MITCHEL having raised caption against Alexander Barclay, younger of Maters, who was rebel at his instance, for sums of money; whereupon a messenger, at his instance, having past to apprehend him, and having met with him, Mr George Law, George and Robert Stuarts being in the rebel's company, impeded the said officer, and debarred him from taking of the rebel, and put him away with violence, with drawn swords and pistols; whereupon the said David Mitchel intends action against them for payment of these sums, for which the rebel was to have been apprehended, and for which he was rebel at the pursuer's instance. The defenders *alleging*, That this was an action of the nature of deforcement, which ought to

No 9.

be pursued after the manner of a cause, at the King's advocate's instance, and should conclude, as is ordained by act of Parliament, c. 118. 1581, that the deforcement being tried, the deforcer's escheat should be adjudged to the King, and the creditors to be paid in the first end thereof; but whereas, it is pursued for payment of the debt, for staying of an officer, and to be so proven by two witnesses, it were of dangerous consequence, the like whereof was never pursued before, nor can be now sustained. The exception was repelled, and the action sustained upon the deed libelled, to infer the conclusion libelled, which the LORDS found ought to be proven by sufficient unsuspected witnesses; and found it not necessary, to urge the pursuer to intent an action of deforcement, as the act of Parliament prescribes; seeing the act prohibits not the party hart, to seek any other lawful redress, as in law he best might; for, if that action was competent to him, which was more, far more this action, whereby less punishment is craved against the defenders, and the pursuer having his option of two causes, he might chuse any of them as he pleased. And this pursuit was found very allowable, and if the King's advocate, or any party having interest, pleased to intent a deforcement against these defenders, that action was also free to them to pursue, unprejudged by this pursuit.

Act. —.

Adv. Advocatus.

Clerk, Scot.

Fol. Dic. v. 1. p. 186. Durie, p. 691.

1672. December 13.

MURRAY against FRENCH of French-land.

No 10.

Found as above.

MURRAY pursues French of French-land for payment of a sum, as he who deforced the messenger in the execution of a caption. The defender *alleged*, That the libel is not relevant, because the acts of Parliament anent deforcement declare the penalty thereof to be the escheat of moveables, and that the party deforced shall have ready access for payment out of the first and readiest of the moveables, but does not bear, that the deforcer shall pay otherwise. *2do*, The act of Parliament puts it in the party deforced his option to pursue civilly or criminally, which must import, that if he have made his election to pursue criminally, as he hath done before the Justices, he cannot pursue civilly before the Lords. It was *answered* to the *first*, That the act of Parliament bears expressly payment of the debt by the deforcer, but doth not say in the same sentence, out of the escheat goods, but by a distinct sentence, that the deforced shall be preferred to the King or donatar, and have ready execution against the moveables; which is a several privilege, and neither ought to be restrained in a case so favourable, for maintaining authority, and the execution of public sentences; for it may readily fall out, that the deforcer have little or no moveables, and so should run no hazard; and it was so decided 25th of July 1633; Mitchel *contra* Barelay, No 9. *supra*; and was lately so decided in the

No 10.

case ——— Scot, son to Longshaw, who deforced a messenger executing a caption. To the *second*, it was *answered*, If the pursuer had insisted criminally for his civil interest of the escheat or payment, he could not have insisted civilly; but having only insisted *ad vindictam publicam* for punishment, as any of the people might do in *actione publica et populari*, it cannot hinder him now to proceed civilly.

THE LORDS repelled both the defences, and found the defenders liable for payment of the sum.

Fol. Dic. v. 1. p. 186. Stair, v. 2. p. 133.

* * * Gosford reports the same case :

ROBERT FRENCH being pursued for payment of the whole debt contained in a bond, granted to Murray, as having deforced the messenger in the execution of his caption against the debtor; it was *alleged*, By acts of Parl. 1587, c. 85, and 1592, c. 152. it was statute, That deforcers of messengers shall escheat their whole moveables, the one half to the King, and the other to the party wronged; so that this being a penal action, and the punishment expressly determined by law, there is no power left to the Judges to extend the same. *2do*, The acts of Parliament, allowing that deforcers may be either civilly or criminally pursued *una electa non recurritur ad aliam*; but so it is, that the defender was pursued criminally before the Justices for that same fault. It was *replied* to the *first*, That the acts of Parliament (render parties) liable to the whole debt, for deterring of deforcers, the escheat of their moveables was statute to belong to the King, and the creditor who suffered thereby, and hath been so determined by the LORDS, Mitchel against Barclay, No 9. p. 2916. It was *replied* to the *second*. That albeit the deforcer was pursued criminally before the Justice for his violence and breach of the peace, yet that hindereth not the pursuer to intent a civil process for his damage and loss, both these actions being consistent, and for diverse causes; and, the law doth not allow to recur, where two actions are competent; only where they are for one and the same cause, and where *pinguior actio electa alia extinguitur*.

THE LORDS did repel the defences, notwithstanding that the acts of Parliament bear, that the creditor *quoad* the debt, whereof he is frustrate, should be first satisfied, before the fisk can have any right, but statutes nothing for payment of the debt by the deforcer; as to which, the debtor himself is still liable. But, in respect of the foresaid practise, and that if the libel had been expressly founded upon damage and interest, undoubtedly it would have been sustained upon that ground, and therefore, they found the defender liable for the debt, seeing otherwise the creditor might be altogether frustrate, the debtor being from the caption, and in a capacity to go away, and the deforcer might be a man of no fortune and his moveables inconsiderable.

Gosford, MS. p. 287.

1673. January 31.

SWINTON against SLICH.

No 11.

THE LORDS found, that they themselves might take trial of a battery *ad civilem effectum*, that the party who does the wrong should *cadere causa*; but that this did not prejudice a criminal pursuit for the breach of the peace.

Fol. Dic. v. 1. p. 186. Garford, MS.

* * See The particulars of this case, *voce* BATTERY, Vol. IV. p. 1368.

1711. June 15.

WILLIAM SCOT against MARK CARSE.

No 12.

A party was fined for a riot, and on account of the same act lost a cause, it being a battery *pendente lite*.

WILLIAM SCOT, chirurgion in Dalkeith, pursues Mark Carse of Cockpen for L. 71 Scots of an accmpt of drugs and medicaments furnished to his family, and for curing a fracture to himself. During the dependence, he beats Scot with a cane over the head, whereupon he is pursued before the Sheriff by the procurator-fiscal, with concurrence of Scot, the party injured; and after probation of the riot he is fined in L. 30 Scots, to be paid in for the use of whom it concerned to the procurator-fiscal. Thereafter, Scot insisted against Cockpen, that seeing the battery *pendente lite* was now proven, he might be decerned to have lost the plea, conform to the certification of the 219th act 1594, and to pay the debt pursued for. *Alleged*, He being already fined in L. 30 Scots for the riot, he cannot be punished again in the same cause, by making him pay the debt, for that were to sustain two penal actions on the same head, whereas law has clearly determined; where a party has two actions arising from one delict, viz. both a fine and tinsel of the cause, if he elect one of them, his option is absorbed, and he can never recur to the other; for then *obstat exceptio rei judicate*; and the law says, *jus agendi super eadem re per priorem actionem consumitur*. *Vid. etiam l. 53. D. de obligat. et act. 2do, Esto* the penal action for the loss of the plea were competent notwithstanding of the fine, yet the battery is not proven; for, there being only two witnesses adduced, and one of them does not condescend on the time when the stroke was given, but only that he saw him beat Scot, the pursuer; now, the essence and quality of the crime, in so far as concerns that conclusion of losing the cause absolutely, consisting in the precise time of its being committed during the dependence of the plea, the witnesses must concur as to the time; which not being here, though it be sufficiently proven to infer a riot and fine, yet *quoad* the effect of the act of Parliament to lose the cause, it is only proven by a single witness. *Answered*, The pursuit for the riot was only *ad vindictam publicam*; and the fine was not to Scot the pursuer, but to the procurator-fiscal; and these words, 'for the use of those concerned,' is not the party injured; but, in their stile, is to the use of the members of court, which is explained by the next clause, reserving action:

No 12.

to Scot. the pursuer for his assythment. So the two actions are not *ad idem*; but, even in the Roman law, *nunquam actiones, præsertim penales, de eadem re concurrentes, una aliam consumit*, l. 130. *D. de reg. jur.* and the Doctors tell us, there is a *concursum cumulativum* as well as *electivum*; where a party insisting for a penalty due by one law, may thereafter crave what is more of penalty, by another law. Yea, if a jurisdiction be limited to a sum, as Justices of Peace in some cases are, the party to get his full satisfaction, may insist before a judicatory of ampler power, to make up and supply what he wants; but here, the charger got not a farthing of the fine, but all went to the use of the court; so nothing debar him from seeking the benefit of the act of Parliament, that Cockpen should lose the plea. To the 2d, anent the witnesses, answered, The fact of beating him is clearly proven; and, though the clerk has inadvertently omitted to adject to one of their depositions, that it was done at the time libelled, yet that is necessarily presumed, unless Cockpen will prove he beat him at another time, that was not during the dependence. Some thought, where the party beat, libels an arbitrary punishment and damages, and takes a decreet in these terms, he cannot raise a new process to seek a different punishment and penalty for the same fact; but seeing the fine came not to his use, the LORDS, by plurality, found Scot might insist to have the penalty of the act of Parliament of losing the cause applied to Cockpen, the defender; and accordingly decerned him in respect of the probation of the battery (which they sustained) to pay the debt pursued for, and so rejected the defences.

Fol. Dic. v. 1. p. 186. Fountainball, v. 2. p. 645.

SECT. IV.

Contingent causes ought to proceed together.—After a Fine for Contumacy, the Judge cannot fine a Second time for the Delict.

No 13.

A cause was advocated, chiefly because there was an improbation depending in the Court of Session, of the same deed which was the subject of the action in the inferior court.

1675. July 2.

BONAR'S RELICT against HIS REPRESENTATIVES.

A BILL of advocation being reported of a pursuit at the instance of John Bonar's Relict, against his Representatives, before the town of Edinburgh, for payment of 10,000 merks, conform to a bond granted by him, the LORDS did advocate, not so much in respect of the importance of the cause, the Town being competent judges; but because there was an improbation depending before the LORDS, upon the same pursuit of the said bond: And *contingentia causa non debet dividi*; and doth found the LORDS' jurisdiction to advocate to themselves all questions concerning the said debt.

Dirleton, No 288. p. 141.

1708. February 14.

THOMSON and PROCURATOR FISCAL of Dumblane against WRIGHT.

ALEXANDER THOMSON carrier in Dumblane, being wounded and bled by Archibald Wright younger of Drumdowl, for neglecting his letters, and giving him ill language, as he alleged, he is convened by the Procurator Fiscal of the regality of Dumblane, and is fined upon a probation of the battery and bloodshed led in absence, in L. 30 for contumacy in not compearance, L. 50 for the bloodwit, and L. 20 for the assythment and cure; in all, extending to L. 100 Scots. Of this decret, Drumdowl raises suspension and reduction, for these reasons, *1mo*, That it was *a non suo iudice*, neither the *locus delicti*, nor the *locus domicilii* being within the said regality; not the place where the delinquency was committed, for that is acknowledged to be in Stirlingshire; nor yet my dwelling, for I was then staying at Charles Row of Inverallan's house, whose apprentice I was, in his calling as a writer to the signet, and I produce the indentures, and that is not within the regality either; so the Steward of Orkney might have as well convened me for this riot as the Fiscal of Dumblane; and one so wrongously cited is not bound to compear and propone his declinator. *2do*, The baron of the ground, where it was alleged to have been committed, attached me, and judged it, and so it was *res judicata* before your citation. *3tio*, He admitted women witnesses to prove a fact done with up-sun, where there could be no penury pretended of witnesses. *4to*, If I had been obliged to compear, I would have proponed this relevant defence to exculpate, that he first gave me bad language, and then assaulted me. *Answered for Thomson and the Procurator Fiscal*, That it is confessed the delict was committed *extra territorium*, but he was liable to the jurisdiction *ratione domicilii*, he being then staying at his father's house of Drumdowl, which lies uncontrovertedly within the regality; and though he was Charles Row's apprentice, yet he was not his house-apprentice, and he had quit his employment then; and for the Baron's decret, it was mere collusion; and *esto*, women were inhabile in this case, which is denied, it is sufficiently proven by sundry men witnesses that it was a very barbarous assault. And for his exculpation, it is now out of time, and contrary to the witnesses' depositions. THE LORDS found *locus delicti* was clearly without the jurisdiction, and that his residence at the time appeared to be with Charles Row at Inverallan, which was likewise without the regality; and so found the decret given *a non suo iudice*, and turned it into a libel; but were of the mind, that if he succumbed in proving previous provocations, the riot deserved a much severer censure than what the bailie of the regality had inflicted; only they thought his procedure illegal, not only as incompetent, but likewise that he both fined for contumacy in not appearing, but likewise cognosed the crime, and fined for it also: whereas he ought to have followed one

No 14.

An inferior Judge having both fined a person accused of a riot for contumacy in not compearing, and likewise cognosed the crime, and fined for that also; the Lords found the procedure illegal, because he ought to have followed one of these methods, and not to have used both.

No 14.

of these methods, and not have used both. I find that of old, such riots and batteries, where there followed blood, were remitted to the knowledge of an assize, as in other criminals is still done; but it is now generally gone into desuetude, and the inferior courts judge both relevancy and probation, without an inquest.

Fol. Dic. v. 1. p. 186. Fountainball, v. 2. p. 431.

See APPENDIX.

CONDICTIO INDEBITI.

1629. January 13.

FINLAYSON against KINLOCH.

KINLOCH being made assignee by Robert Finlayson, to the mails of a house pertaining to him, and the assignation being intimate to the possessor, and another creditor to Robert Finlayson having arrested the said mails, after the said intimation, for satisfying a preceding debt, decerned against the said Robert, and upon the arrestment recovering sentence, and upon the sentence going to poid, for eschewing thereof the possessor having payed; the LORDS, notwithstanding of the said sentence and payment, found that the assignee, who first intimate before the arrestment, ought to be preferred; albeit the arrester *alleged*, that nothing had followed upon the said intimation, nor no diligence done thereupon by the assignee, while this present pursuit moved by him against the said possessor, which was not intended until after his sentence and payment, so that his prior diligence *qui sibi vigilavit*, was *alleged*, ought to be preferred to the assignee, who did nothing by the space of a year, or little less, after his intimation; even as when many arrestments are made by sundry creditors, not the first arrester, but the first doer of diligence upon his arrestment, is to be preferred; so not the first intimation, which is of no greater force than an arrestment, but the diligence ought to be repelled; notwithstanding whereof the first intimation was preferred.

Act. Lermouth.

Alt. Mowat.

Clerk, Scot.

Fol. Dic. v. 1. p. 186. Durie, p. 413.

No 1.
Action of re-
petition found
competent to
an assignee a-
gainst an ar-
rester, whose
arrestment
was posterior
to the intima-
tion of the
assignation,
but who had
obtained pay-
ment on a de-
cree of furth-
coming.

1661. July.

JACK against FIDDES.

THERE being a decret recovered by another Fiddes against Jack, before the English officers at Leith, in the beginning of the year 1652, for a sum of money; whereupon Jack being incarcerate, he was forced to give a bond to this defender, who was assignee constitute by this Fiddes, and to give his brother cautioner therein. Upon which new bond Jack was also charged, and an act of warding followed thereupon; the bond being registrate in the town court-

No 2.
*Condictio inde-
biti* was sus-
tained, al-
though it was
pleaded, that
there existed
an *obligatio na-
turalis vetri-
viliis*, prior to

No 2.
the payment,
by a bond and
sentence of a
court; but
the bond was
obtained by
improper
means, and
the court was
not duly con-
stituted.

books of Edinburgh. Jack gave in a bill to the Parliament, which was remitted to the Session, desiring repetition of the sum. It was *alleged*, There could be no *indictio indebiti*, where there was *obligatio naturalis* or *civilis* preceding: *Ita est*, there was not only a civil obligation by the sentence recovered, but by the new bond granted to the assignee, who was not obliged to know, how, or what way the sentence was obtained: And Jack having transacted therefor, he could not now be heard to quarrel the transaction against the assignee, or to crave repetition. It was *answered*, That the officers' sentence was most unjust, both in the matter and in the manner, they having no civil jurisdiction: And the same defender was assistant to the *cedent* in recovering of the sentence, as he will not deny. Likeas, the pursuer was forced to grant the new bond to him as assignee, and pay the new bond to free himself of prison; there being no civil judicatory, where he could have any remedy; the English Judges for administration of justice not being then established, who sat not till June 1652. And though it had been sitting, it could not have been expected that Jack could have helped himself, by any course they would have taken, for annulling the sentence of the English officers. Likeas, by an act of the late Parliament, all sentences pronounced by the Englishes, since their in-coming, are appointed to be reviewed.

THE LORDS repelled the allegiance, and sustained repetition.

In presentia.
Gilmour, No 4. p. 4.

No 3.

A person who has received payment of what is due to him, is not bound to refund, altho' received from another person than the proper debtor. But an executor-creditor confirmed, having obtained payment from the debtor's heir, was obliged to refund, it having been discovered that the debt had been paid to the original creditor. Here neither was the one party creditor

1673. January 10.

RAMSAY against ROBERTSON.

THERE being a sum of 900 merks due by Mr Simon Ramsay to Sir John Prestoun, he obtained decret against John Ramsay as heir to his father for payment, and did obtain payment, and granted a discharge; but John Ramsay having died out of the country, Sir James Ramsay who succeeded to him, did not for a long time fall upon the discharge, but after Sir John Prestoun's death, Robertson was confirmed executor-creditor to him, and did confirm this sum due by the decret against John Ramsay, and thereupon a pursuit was raised against Sir James Ramsay; but before sentence Sir James paid the whole sum; and now having the discharge, pursues Robertson the executor-creditor for repetition; and likewise the heir of Prestoun of Airdrie for repetition of the sum, as *indebite solutum*; and insisted, *primo loco*, against Robertson; who alleged absolutor, because *indebite solutum* takes only place where neither the payer was debtor, nor the receiver was creditor; but if the receiver got no more than his own, albeit it was not from the true debtor, there is no competent *condictio indebiti*, as is clear, l. 44. ff. de *condictione indebiti*, *repetitio nulla est ab eo qui suum recepit, licet ab alio quam vero debitore solutum est*, and l. 5. cod. de *repetitione hereditatis*: And it is beyond question, that l. 2. cod. de *condictione in-*

debiti, that *indebitum per errorem solutum ex delegatione repetitur adversus delegantem, sed non adversus eum, cui fit solutio*; which is most consonant to our custom, whereby if a creditor get payment of his true debt against the debtor of his debtor, he is for ever secured; and albeit the payer may have repetition against his own creditor, yet never against a third party who receives no more than his own, which is a common and public interest in favours of creditors; and so if a debtor draw a precept upon any person in favours of his creditor, if that person pay, he can never recover from the creditor whom he paid, albeit by the clearest evidence he should show he paid him by error, not being really debtor, but can only repeat against him who drew the precept: Or if a creditor arrest, and obtain sentence for making furthcoming, and obtain payment, albeit thereafter it should be found that the payer was not truly debtor, yet the arrester is secure; and it must also be so in the case of an assignee, taking assignation of an anterior debt, and recovering payment thereby; much more in the case of an executor-creditor, who cannot arrest, and hath no other way to recover his debt, but by confirmation; so that Robertson, being executor-creditor, and getting payment from Ramsay of his just debt, who accepted from him an assignation, with warrantice from his own deed only, he is not liable to repeat, as *indebite solutum*, but Prestoun only, to whose behoof the payment was made, and who thereupon was liberate. 2^{do}, It is offered to be proven by the pursuer's oath, that he did not make payment to the executor, but that Prestoun confirmed Robertson executor-creditor, that he might satisfy his debt without his knowledge; and the pursuer did transact with Prestoun, and paid to Prestoun the money, which Prestoun paid to Robertson, and got his discharge, with an assignation blank in the name by Robertson, which assignation he filled up in the name of Ramsay. 3^{tio}, This being a transaction *lite pendente*, cannot be recalled upon pretence of the finding of any new instrument, which is an uncontroverted principle in law, without which no plea could be ended, and the payment made *pendente processu*, which hindered the decret, must be as effectual, as if payment had been recovered upon a decret. It was answered for the pursuer, That the defences ought to be repelled, and his pursuit is very ill founded *ex condictione indebiti*; for it imports not whether the party to whom he paid was creditor to another, but whether the pursuer paid to him *debite* or not; so if the pursuer was not debtor, it is *indebite solutum*; and albeit if the pursuer had paid upon a decret *in foro*, he might be excluded upon any new writ as *noviter veniens ad notitiam*; it being *in arbitrio judicis* to admit or reject such writs; which though they ordinarily admit against the principal party, yet it might be more doubtful, whether they would admit it to reduce a decret to make a creditor repeat; or if there had been a transaction diminishing a part of the right, for shunning the uncertainty of a plea; but there is neither decret nor transaction, although *pendente processu*: And albeit in the case of a precept or delegation, there could be no repetition from the creditor, yet that cannot be drawn into the case of an executor-creditor, or to the case of an assignee,

No 3.

nor the other debtor; for, though the executor-creditor was creditor in the debt upon which his confirmation proceeded, he was not creditor in the debt in question, which was extinguished by payment before his confirmation; as to which he could be in no better case than his own debtor.

No. 3.

who both to take right to, and found upon their author's right, and therefore must run the hazard thereof, if it be reduced, and so must repeat; but he who gets payment without taking assignation or any right, *non utitur jure auctoris, sed suo*, and so can never repeat, which is all that the law saith, viz. if any man pay another man's debt in name of that other, whereby he liberates him, albeit the payer was not debtor, he cannot recover it; and so in the case of *delegation*; but by that same title it is clear, that he who supposing himself heir, paid as heir, if he were not found to be heir, he might repeat likewise.

THE LORDS found that member of the defence relevant, that payment was made by the pursuer, not to the executor-creditor, but to Prestoun, or some having warrant from him, and that he paid to the executor-creditor, and got an assignation from him blank in the name, which is filled up by him or the pursuer in his name; and the pursuer having upon his oath denied the same, the LORDS proceeded to determine the remaining points, and found there was here no transaction nor abatement, and that seeing the executor-creditor had gotten payment without sentence, he was liable to repeat, the pursuer always assigning to him this action against Prestoun, that he might recover payment of his first debt which he had discharged; but the LORDS refused to decern annual-rent, or any thing in name of expense, seeing the double payment was not taken by that same person *mala fide*, but by an executor-creditor *bona fide*.

Fol. Dic. v. 1. p. 186. Stair, v. 2. p. 146.

. Gosford reports the same case.

ROBERTSON being confirmed executor-creditor to Sir John Prestoun of Airdrie, and having given up a debt due by Sir James Ramsay's brother, to whom Sir James was heir, did intent action against him for payment of the debt, whereof he made payment to, and recovered a discharge from Robertson; but thereafter, finding that the debt was paid to Sir John Prestoun, who had granted a discharge thereof in his own time, he did pursue Robertson for repayment, as being *indebite solutum*. It was *alleged* for the defender, That he ought to be assoilzied, because his name was only borrowed by James Prestoun who had caused confirm him executor-creditor to his father; and thereafter having obtained a discharge from him, did transact with the pursuer, and did receive payment of the debt, so that he could not be liable to re-fund the money *condictione indebiti*, not having received the same as having a title established in his person. It was *replied*, That Robertson having granted the discharge upon payment, he was liable *condictione indebiti* to the pursuer, who paid the same; and, as to any trust or delivery of the discharge to James Prestoun, that he might receive the money, it did not concern the pursuer, but Robertson might recover the same of James Prestoun. THE LORDS having examined the pursuer upon oath, who declared, that he had only transacted with Robertson and

paid him the money, did sustain the pursuit against him for repetition; but ordained the pursuer to assign to him his right, that he might recover the same off James Prestoun; but if his legal title of executor-creditor had been good, or if he had been a true creditor, they did not decide, albeit it be most probable, that where assignees or arresters, or comprisers recover payment upon their titles and diligence, of those who only represent the debtors, or know nothing of the discharges of the debt until thereafter they recover the same, that in law they have *condictio indebiti*, which would not be allowed to the debtor himself, who had formerly paid the debt; for, in that case, they would only have action against the creditor himself, who had received the first payment.

Fol. Dic. v. 1. p. 186. Gosford, MS. p. 297.

No 3.

1681. February 23. The E. of MAR against The E. of CALLANDER.

THE Earl of Mar pursues the Earl of Callander to repeat a part of the sum of 6000 merks paid by him and his chamberlains to Callander, more than was due, in so far as he having been due to the Laird of Gloret by bond 6000 merks of principal, one of his chamberlains had paid 1000 merks thereof to Gloret, and a subsequent chamberlain, not knowing of the former, paid to Callander, as assignee by Gloret, the whole sum, principal and annual, so that the 1000 merks was twice paid, and was *indebite solutum* to Callander, it having been paid before to his cedent. It was *answered* for Callander, That Gloret being debtor to him in the like sum, he had, for his satisfaction, assigned him his bond, so that he having received no more from Mar, than what was due to him by Gloret; he was not obliged to repeat what he had received, in solution of a just debt, for 'repetitio nulla est ab eo, qui suum recepit, tametsi ab alio quam vero debitore solutum est; L. 44. ff. de condictione indebiti; and L. 2. Cod eodem, soluti ex delegatione repetitio nulla est contra delegatum, sed contra delegantem, licet sit ex errore solutum,' so that Callander's assignation from Gloret to Mar's bond, in satisfaction of a debt due by Gloret, is a delegation of Mar, Gloret's debtor, in place of Gloret himself, and therefore there can be no repetition of what was paid by Mar through error against Callander, though it may justly be against Gloret; seeing Callander has received nothing but the payment of his true debt; which is according to our ordinary custom, that if any make payment of another man's debt, upon that debtor's precept, he can never repeat it, upon pretence that it was *indebite solutum*, and that he paid by error, when he was not due; and an assignation being but a procuratory *in rem suam* is in the like case. It was *answered*, That as the Earl of Mar might have excluded Callander before he got payment, as to this 1000 merks paid to his cedent before his assignation, so having paid what was not due, he may justly repeat it, as it was found in the case of.

No 4.

A creditor having assigned the whole sum, after getting payment of a part, and the assignee getting payment of the whole, it was found relevant against a *condictio indebiti*, pursued against him, that his assignation was in satisfaction of a debt due to him by the cedent, equivalent to the sum assigned; so that he got no more from the debtor what was due to him by the cedent.

- No 5. Sir James Ramsay against Robertson, No 3. p. 2924. where the LORDS 'decerned Robertson to repeat what he, as executor-creditor, had recovered 'from Ramsay, upon finding of a discharge of the debt;' and here the payment was not made by the Earl or by his warrant, but by the error of his chamberlains. It was *replied*, That what was paid by Ramsay to Robertson was not voluntary, but by a transaction upon a depending process; but voluntary payment, of what was due to a creditor, though the payer was not debtor, can never be repeated, whether it were paid by the Earl, or by his chamberlains, or any other.

THE LORDS found Callander obliged to repeat, if he had acquired the assignation, for payment of a sum whereby he was in the same case as his cedent, and was not a creditor as to what was paid before his assignation, but found it relevant, 'That his assignation was in satisfaction of a debt due to him by Gloret before the assignation, equivalent to the sum assigned;' so that he got no more from Mar and his chamberlains, but what was to him by Gloret.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 866.

1684. *March.* ANDREW KER in Chatto, *against* WALTER RUTHERFORD.

No 6.

A DEBTOR, who had paid to the obtainer of a decret of furthcoming, and got his discharge, being thereafter decerned at the instance of an assignee, whose assignation had been intimated before the arrestment, pursued the arrester upon the warrandice in his discharge.

Alleged for the defender; He could not be liable, seeing *sum receptit*, and the pursuer had not obtruded, as he ought, the anterior intimation of the assignation, during the process of furthcoming; which, if he had done, the arrester would have secured himself against the other estate of the common debtor, who is now become bankrupt.

THE LORDS sustained the allegiance, and assoilzied.

Fol. Dic. v. 1. p. 186. Harcarso, (ARRESTMENT.) No 81. p. 15.

1713. *July 12.* CREDITORS OF MUIRHEAD *against* HAMILTON.

No 7.

A SCOTSMAN, who died a soldier in Flanders, having left a sum of money in the hands of his Colonel, which a creditor of his uplifted from the Colonel, by virtue of an administration in the Prerogative Court of Canterbury; the LORDS found it relevant to assoilzie the creditor from repeating the money from executors *qua* creditors, confirmed before the Commissaries of Edinburgh, that he had got *bona fide* payment before any process or confirmation in Scotland.

Fol. Dic. v. 1. p. 187.

* * See The particulars of this case No 26. p. 1796.

1723. July 24.

DUKE of ARGYLE *against* REPRESENTATIVES of the LORD HALCRAIG.

ARCHIBALD EARL of ARGYLE, *anno* 1672, granted bond to Mr John Ellies for 5000 merks; who, of the same date, gave a back-bond, declaring, 'That he had a bond from Donald and Ronald Campbells, for L. 2250 Scots, whereof if he received any part, he obliged him, his heirs, &c. to allow the same in payment of the 5000 merks.' This bond of 5000 merks, coming by progress into the person of the Lord Halcraig, the late Duke of Argyle granted corroboration thereof, narrating, 'That in regard this sum was by progress in the person of the Lord Halcraig, therefore he obliges himself to pay the same.' All this while, the back-bond was entirely unknown, either to the late or present Duke, till July 1715; at which time, by payment made, and imputing the sums contained in Donald and Ronald Campbell's bond, the 5000 merks bond was not only extinguished, but a considerable sum over *indebite* paid; whereupon a process was intended against the Representatives of the late Lord Halcraig, concluding an extinction of the bond, and repetition of L. 1277 Scots, paid over and above what was really due.

It was *pleaded* for the defenders, *imo*, That the Duke corroborating the bond in the Lord Halcraig's person, and expressly obliging himself to pay, was bound to the assignee by his own contract; after which the assignee needed not be concerned, whether any part was paid to his cedent or not; *2do*, If the debtor was ignorant of the back-bond, and of any payments made to the cedent, *sibi imputet*; it is more just, the original creditor's representatives being now bankrupt, that the debtor, whose business it was to know, should suffer by his ignorance, than the assignee: The assignee, in taking the corroboration, took all reasonable precaution for his security; and he had thereby reason to rely upon his assignation, as absolutely good, and free of all exception.

Answered to the *first*; It is in vain to plead upon the corroboration, which in no view can import a more express acknowledgment of the assignee's title, than the actual payment that was made to him; and therefore, since a *conductio indebiti* is competent, when payment is made *indebite, errore facti*, which was truly the case here, the Duke not having known of the back-bond, it will not be the less competent that a corroboration intervened: And the reason of both is the same, corroboration and payment are neither of them absolute unqualified acknowledgments of the creditor's title; they go upon the supposition, that the title is otherwise well-founded; if which prove false, whatever is built thereupon must fall to the ground. To the *second answered*, If the original creditor's representatives are bankrupt, that naturally falls upon the assignee, whose faith he followed, and not the debtor. The debtor truly made twice payment, and has a *conductio indebiti*, well-founded thereby against the assignee; which

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No 8.

An heir having ignorantly paid a debt over again to an assignee, which his predecessor had before paid the cedent, was found to have no repetition off the assignee, the cedent becoming bankrupt after the second payment.

No 8.

action cannot be taken from him, unless the assignee will qualify some fault, some negligence of the pursuer's, which yet cannot be done, by reason that the back-bond truly had fallen aside long before his time ; and he was no way negligent as to that matter. And if they ascribe this effect to the pursuer's inculpable ignorance, then it must follow in general, ' That a debtor can never obtain a *condictio indebiti*, if the cedent became insolvent any time after the payment, of which repetition is sought ;' a position that is apprehended to be without any foundation in law : For, as inculpable ignorance is never reckoned sufficient to bear out an action of damages for reparation ; as little to bear out an exception of damages, in order to take away an action that is otherwise competent.

Replied to this last ; It is sufficient to qualify that the loss happened through the ignorance and error of this pursuer: For, since one of them must bear the loss, it is more equitable that it fall upon the pursuer, who was in an error, than the defender who was in none ; and no body ought to be prejudged by another's errors.

THE LORDS sustained the defence, That after the assignation to the Lord Halcraig, the late Duke of Argyle did corroborate the bond assigned in the person of the said Lord Halcraig, relevant to assoilzie the defender from any repetition or extinction.

Fol. Dic. v. 1. p. 187. Rem. Dec. v. 1. No 39. p. 78.

No 9.

1733. July 26. STIRLING of Northwoodside *against* EARL of LAUDERDALE.

Condictio indebiti sustained to one who had paid *errore juris*.

Fol. Dic. v. 1. p. 187.

* * See The particulars of this case in the APPENDIX.

No 10.

A sum due by a writer's account, was paid after his death to the husband of his daughter, his executrix. Afterwards a receipt for part of the sum was found. The daughter pleaded against repe-

1745. June 24. THE EARL of PETERBOROUGH *against* MRS MURRAY.

UPON the death of Hugh Sommerville, writer to the signet, who had been doer for the Lord Mordaunt, now Earl of Peterborough, there was a sum, as the balance due to him upon his accounts paid in to Mr James Geddes, and Mr Hugh Murray, his daughters' husbands, without this particular being confirmed ; but after their confirmation as nearest of kin, which the Lords have since found determined the interest of parties with regard to the whole executry.

Afterwards there was found a receipt of Mr Sommerville's for L. 50 Sterling from my Lord's factor, to be employed for his Lordship's law affairs, in so far as not already employed, and for this receipt no credit had been given in the account.

My Lord Peterborough pursued Mrs Murray, one of the daughters, for L. 25, being her share of the L. 50, as representing her father, who *pleaded*, That the sum was *indebite solutum* to her husband now dead, and ought to be made good by his executors.

Pleaded for the pursuer; That there was no undue payment; for that Mr Sommerville's claim on the balance of his accounts, and his Lordship's claim upon the receipt, were separate debts, and there was no necessity of making use of the one of them to compensate the other; for a person may chuse whether to postpone compensation, or to pay his own debt, and afterwards insist for the one due to him.

Pleaded for the defender; That no more was due to Mr Sommerville than the balance of his account, wherein he ought to have been charged with the sum in this receipt, which the pursuer had in his hands; and he having made an undue payment to Mr Murray, whom the defender does not represent, she cannot be liable for it.

THE LORDS repelled the defence, reserving action against the executors of Mr Murray.

Reporter, Lord Justice Clerk. Act. A. Pringle. Alt. W. Grant. Clerk, Kilpatrick.
Fol. Dic. v. 3. p. 156. D. Falconer, v. I. p. 107.

No 10.
tition, that her husband, to whom it was paid, was dead, and she did not represent him. She was found liable as representing her father, reserving action against her husband's executors.

1778. August 5. ROBERT CARRICK against JOHN CARSE.

IN 1768, Carrick became bound as cautioner for Robert Robb to Carse and others, in a bond for L. 100, payable at Whitsunday, and containing a clause of relief in favour of Carrick. No demand was made for this money till November 1776, when Robb having become bankrupt, Carse required payment from the cautioner, Carrick, of the principal sum, and half a year's interest then due. Carrick, after looking at the bond, said, 'there was no help for it,' and paid the money.

Next day he required of Carse to repeat the money, on this ground, that he had paid it by mistake, when not bound, seven years having elapsed from the date of the bond. Carse refusing to comply with the demand, Carrick brought an action for repetition against him and the other creditors. The pursuer admitted that he was in the knowledge of the law at the time he made the payment, but *alleged*, that he was ignorant of the fact that the seven years were elapsed.

Pleaded in defence; The money paid was due at the time by the pursuer to the defender, *jure naturali*.—The statute 1695, c. 5. gives the cautioner an exception, after the lapse of the seven years, on which, if sued in a court of law, he may refuse payment: But it does not take away the obligation in equity on the cautioner, to indemnify the creditor, who, on his faith, trusted his property

No 11.
A cautioner paid a debt, and next day demanded repetition, as he found he was free, by the expiry of the septennial limitation. Answered; He was liable *jure naturali*.—Repetition was ordered.

No 11. with the principal debtor. It is an established point, that, where a person lies under an obligation, *jure naturali*, to pay, if the money is paid, no action for repetition lie ; *l. 13. et 16. De Cond. Ind.* ; *Voet. de Pact. § 2. et 4.* ; *Ersk. B. 3. t. 3. § 54.* ; *Bankt. B. 1. t. 8. § 27.*

2do, Even where there is no obligation in equity, repetition of money paid from alleged ignorance of law in every case, or of fact, when gross and inexcusable, cannot be required, if payment was made to the proper debtor, *qui suum recepit* ; *Voet. l. 12. t. 6. § 7. l. 6. ff. De juris et fact. ign.* The pursuer admits that he knew the law. As he read over the bond, it must be presumed he knew the fact, that seven years were elapsed from its date. At any rate, it is a fact of that kind, of which the law does not excuse the ignorance. And, therefore, the case is the same as if he had made payment, knowing that he could have got quit of the debt under the exception given by the act 1695, but not chusing to use it.—Action of repetition, therefore, does not lie.

Answered for the pursuer ; *1mo*, The principal debtor, who receives and has the benefit of the money, lies under a moral obligation, independent of his bond, to restore what he received. But the cautioner receives nothing, and lies under no other tie to the creditor, but the civil obligation which he comes under in the bond, the extent of which has been regulated by law.—The statute 1695 does not merely give an exception against payment to the cautioner, after lapse of the seven years, but declares him, '*eo ipso*, free ;' so that the obligation is totally at an end, as much as if it had never existed. This is laid down, and the distinction betwixt this statutory liberation, and that of prescription, is illustrated by *Bankton, B. 2. t. 12. § 38. and § 74.* ; *Ersk. B. 3. t. 7. § 24.*—It is therefore the same thing as if it had been expressly stipulated in the bond, that the cautioner was to remain bound for seven years, and then to be free.

2do, When there is no obligation in equity to pay, it makes no difference whether the mistake arises from ignorance of law or fact, of whatever species. Unless it appears that the money was given as a donation, it must be restored on the common principles of justice ; for the receiver holds it *sine causa*, as he can derive no right from mere error ; and the person who put the money into his hands continues in the just right to it, notwithstanding the mistake.

This is the received doctrine of our law ; *Stirling against Lauderdale, No 9. p. 2430.* ; *Bank. B. 1. t. 8. § 27. and B. 1. t. 23. p. 467.* ; and it is agreeable to the principles of the civil law. That law distinguishes betwixt the case where the person who falls into an error is in *lucro faciendo*, and when he is only in *damno vitando*. In the former case, the civil law did not restore him against errors in law, or gross errors in fact, such as *error facti proprii*. But, in the latter, every species of error was excusable ; *l. 27. de usu. et usurp.* ; *l. 15. § 2. de contr. emp.* ; *l. 2. 3. 4. 7. de jur. et fact. ignor.* *Vid. Kinn. Sel. Quæst. l. 1. c. 47.* In this instance the pursuer is clearly in *damno vitando*, seeking back what he had parted with only by mistake, and which, if not restored, he can never recover, as the debtor is bankrupt. The person who attempts to profit by this

mistake, *non suum recipit*, though a like sum is due him by another. It is only where there is no error, and the debt is paid by a *negotiorum gestor*, for the debtor, that the creditor is said, in the civil law, *suum recipere*, l. 2. 6. *de cond. ind.* But, when that does not appear, *alienum recipit*: For the debt due to him by one, can give him no title to the money of another.

That no donation was meant in this case, is evident from the transaction, and the words used by the pursuer when the payment was made.

Observed on the Bench; It makes no difference whether the payment was made from error of law or of fact; it is sufficient that it proceeded from mistake; and, when payment is made *sine causa*, it will be presumed to have proceeded from error, and not donation, unless the contrary can be proved. The payment is made *sine causa*; for, after the lapse of seven years, there was no obligation, natural or civil, on the cautioner.

THE LORD ORDINARY 'found the defenders liable, conjunctly and severally, to repeat and pay back the sums libelled.'

THE COURT adhered to the Lord Ordinary's interlocutor, on advising a reclaiming petition and answers; and again adhered, on advising a second petition and answers.

Act. *Hay Campbell.*

Alt. *Rae, Rolland.*

Fol. Dic. v. 3. p. 157. Fac. Col. No 41. p. 70.

1792. November 14.

WILLIAM KEITH *against* CHARLES GRANT, RICHARD MOLESWORTH, and Others.

SIR ALEXANDER GRANT of Dalvey purchased the barony of Clava, and certain lands near the borough of Nairn, from James Rose. Sir Alexander took infeftment in the lands of Clava, but his right to the Nairn lands remained personal at his death.

In 1771, he granted an heritable bond for L. 10,000 over his whole purchase, to Archibald Grant of Pittencrieff, by whom it was disposed in trust to Colquhoun Grant, writer to the Signet.

Sir Alexander having died much in debt, his brother Sir Ludovick entered heir to him *cum beneficio inventarii*; and, in 1783, he disposed the whole of the said estate to Mr Keith, accountant, in trust for his brother's creditors.

The trustees, in 1786, sold the barony of Clava to Charles Gordon, at the price of L. 6800.

In 1787, he sold the Nairn lands for L. 5000 to David Davidson, who, with the approbation of Mr Keith, and in consequence of minutes of the creditors, paid the price to Colquhoun Grant, in part of the above heritable bond.

Mr Gordon, in 1788, again sold, for L. 5400, the barony of Clava, except the lands of Fleeness, to Mr Davidson, by whom L. 5000 of the price were paid to

No 11.

No 12.

Condictio indebiti takes place where a party obtains a preference in a ranking to which he is not entitled, although he has got no more than payment of his debt.

No 12. Colquhoun Grant, to further account of the same bond, and interest due upon it. This payment was also authorised by Mr Keith.

Soon after these transactions, Mr Keith having for the first time discovered, that Sir Alexander Grant had never been infeft in the Nairn lands, and that, therefore, the infeftment on the heritable bond, as *quoad* them flowing *a non habente*, could only affect the barony of Clava, brought an action, concluding, that Messrs Davidson and Gordon should be decerned to pay to him the price stipulated for their respective purchases, or if the Court should be of opinion that the payments made to Colquhoun Grant were sufficiently authorised, that his representatives should be compelled to repeat all they had received, or at least the price of the Nairn lands.

Messrs Gordon and Davidson had by this time brought an action against Mr Keith, and all concerned, the object of which was, to have it declared, that the payments made to Mr Grant should *pro tanto* discharge them of the price of their purchases, and that Mr Keith, on receiving the balance, should be ordained to grant them proper titles.

In these actions, which were conjoined, appearance was made for Charles Grant, the general disponee of Colquhoun Grant, and by Richard Molesworth, as acting for the representatives of Grant of Pittencrieff, who

Pleaded; 1st, The payment of the price of Clava is liable to no objection. And, with respect to the price of the Nairn lands, however defective as to them the infeftment on the heritable bond may be, yet the payment having been authorised by Mr Keith, it cannot now be recalled. Sir Alexander Grant's heirs are at least personally bound for the whole L. 10,000, and interest; and as Colquhoun Grant only received L. 10,000 in all, neither his heirs nor the heirs of Archibald Grant can be subjected to any claim of repetition. The *condictio indebiti* does not lie where a person only gets payment of what is truly owing to him; Stair, b. i. tit. 7. § 9.; 12th June 1713, Creditors of Muirhead against Hamilton, No 7. p. 2928.

But, 2dly, Even allowing that Archibald Grant's sasine in the Nairn lands may have been originally invalid, the defect was removed by the infeftment in these lands obtained by Sir Ludovick, the heir of Sir Alexander, whereby in the eye of law he became *eadem persona cum defuncto*. For the maxim *jus superveniens auctori accrescit successori* applies not only where the *auctor* himself acquires the supervening right, but also where it is acquired by a person liable in absolute warrandice of the deed; Dirleton's Doubts, *voce Jus Superveniens*, and Stewart's Answers; Bank. b. 3. tit. 2. § 16. and 17.; Stair, b. 3. tit. 2. § 2.; Ersk. b. 2. tit. 7. § 4.; 15th February 1665, Boyd against Tenants of Cairsluth, *voce* WARRANDICE; 1st December 1676, Lindsay against Grierson, *voce* JUS SUPERVENIENS, &c.

Answered for Mr Keith; 1st, The brocard *repetitio nulla est ab eo qui suum recepit* is misunderstood. It relates merely to the case of a person voluntarily interposing to pay the debt of another, where, although he should have done so from mistaken motives, the civil law gives him no claim of repetition, if the mo-

dey was due by the true debtor. But where a person pays the debt of another, upon the erroneous supposition that he lies under an obligation to that purpose, the competency of the *condictio indebiti* was never disputed; Voet, l. 12. tit. 6. § 9.; 5th August 1778, Carrick against Carse, No 11. p. 2931.

2do, As Sir Alexander Grant never was infeft in the Nairn lands, there was no feudal right in him which could accresce *successori*. It is therefore impossible his heir can be considered as *eadem persona* with him as to that property, so as to make the right now in him accresce to the heritable bond. Sir Ludovick in fact does not represent Sir Alexander in these lands. He is successor in them, not to his brother, but to James Rose. He is a singular, not an universal successor. Sir Alexander, as to the real right of these lands, was in effect a stranger, and continued till his death a mere creditor to Rose for the property.

Although it may be true negatively, that where a person is *not* bound in absolute warrandice *jus superveniens non accrescit*, it will not hold positively, that in all cases where the person is bound in absolute warrandice, the *jus superveniens* does accresce. Two sorts of rights may here be distinguished. Personal rights, which pass by a mere dispositive act, and real rights, constituted by infeftment. With respect to the *first*, where the *jus supervenit* to any person bound in warrandice, it may accresce, because the will of the party is all that is requisite in order to convey. But this cannot hold in landed property, where certain solemnities are necessary to accomplish the transfer, such as sasine given by the author to the successor. Where indeed a person who is not *in titulo* at the time gives infeftment to another, and is himself thereafter vested in the feudal right, the *jus superveniens* does accresce. All the necessary solemnities here concur, although there has been a little irregularity in point of time. But when the infeftment flows from a person who, at no future period, acquires the feudal right, there is an essential defect in point of solemnity which never can be supplied. All the authorities quoted on the other side apply to the accretion of heritable rights, where sasine is not necessary, such as the casualties of non-entry and liferent escheat.

THE LORD ORDINARY reported the cause on informations.

Observed on the Bench; The *jus superveniens* cannot accresce in the present case. If an author, after giving infeftment, is himself vested in the feudal right, his title becomes complete both in form and in substance, and this new acquisition of right is communicated to all his former deeds. But a sasine obtained *a non habente* is altogether inept, and cannot be cured by any supervening right in his heir. In personal rights, the law holds an obligation to convey, and a conveyance to be the same; and therefore every person liable in absolute warrandice is bound to grant the conveyance. But in heritage, although an heir, whose ancestor conveyed, having only a personal right, is liable in warrandice, and is obliged to give an infeftment; still that infeftment cannot proceed on the precept granted by the ancestor, who never acquired any right:

No 12.

which entitled him to grant that warrant. The circumstance of Sir Ludovick having entered heir *cum beneficio*, does not in the least affect the case.

The rule, *Nulla repetitio*, &c. applies only where the debt was due *jure naturali*. Here the obligation on the trustee to pay to Colquhoun Grant the price of the Nairn lands, was altogether *civilis*, and contrary to his duty to the other creditors. Mr Keith had no title *qua* trustee to apply the funds in any other manner than as the law directs.

The interlocutor of the Court was as follows: 'Find, That Archibald Grant of Pittencrieff's heritable security was only effectual as to the barony of Clava, but not as to the Nairn lands and fishings; and therefore, that his representatives, in so far as they have received payment of more than the purchase-money of said barony, must repeat the same to the trustee for the creditors of the common debtor; assoilzie Messrs Davidson and Gordon from the action at the instance of the trustee, in so far as payments were made to Mr Colquhoun Grant of the prices of their respective purchases; and upon payment of the balance thereof, find, that Mr Keith is bound to grant a disposition of the lands of Clava to Mr Davidson, and a disposition to Mr Gordon of the lands of Fleeness, in terms of the articles and conditions of sale.'

A reclaiming petition for Molesworth, and another for William Keith, were refused, without answers, on the 4th December 1792.

Lord Reporter, *Hailes*.

For Charles Grant, *R. Craigie*.

For Molesworth, *Archibald Grant, junior*.

For Mr Keith, *Maconochie, M. Ross*.

For Messrs Davidson and Gordon, *Rolland et Alii*.

Clerk *Sinclair*.

R. D.

Fol. Dic. v. 3. p. 157. Fac. Col. No 1. p. 1.

See APPENDIX.

C O N D I T I O N .

S E C T . I .

Si Sine Liberis.

1605.

LINLITHGOW *against* CAIRNCROSS.

No 1.

WHERE the bairn was born and died before the mother, (THE LORDS)
fand, quod extitit conditio, et casus restitutionis dotis solutæ.

Fol. Dic. v. I. p. 187. Kerse, MS. fol. 65.

1624. March 2.

LO. CURRIEHILL *against* EXECUTORS of CURRIE.

No 2.

IN an action at the instance of Lord Curriehill, against the executors of um-
 quhile Walter Currie, for payment of the sum contained in a bond, given to
 the pursuer by the said Walter, whereby he obliged him, for the pains taken by
 the pursuer in his affairs, and because he had debursed some charges in doing
 thereof, to pay to him 500 merks, at the term after the said Walter's decease,
 if before his decease, the said Walter did no other deed, which might be dero-
 gatory to the said bond, and if also he died, having no heirs-male gotten of his
 own body; against this bond and pursuit, the executors compearing, *alleged*
 that the bond was *donatio mortis causa*; likeas, according to the tenor thereof,
 it was manifest, and conform thereto, the maker in his testament, had left the
 pursuer 1000 merks, and ordained the first bond, whereupon this pursuit is
 founded, to cease and become extinct; and also *alleged*, That Walter Currie
 had left one daughter only, who was married, and had sons, who behaved to be re-
 pute heirs-male gotten of his body, and so the condition of the bond thereby
 was taken away. These allegiances were repelled, and the bond found not to
 be *donatio mortis causa*, nor to be revoked by the said posterior testament, see-
 ing it was made for onerous causes, and therefore was not revokeable, nor could

A bond was granted by a man to his lawyer for a sum payable at the first term after the granter's decease, providing he died having no heirs-male of his own body. It was found that the heirs-male born of the defunct's daughter, did not purge the condition, which was interpreted of sons begotten immediately by the granter himself.

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No 2.

be altered, or the force thereof prejudged anyways by the maker; and also, it was found, that the heirs-male, born by the daughter of the defunct, purged not the condition of the bond, which ordained the sum to be paid, if the defunct had no heirs-male gotten of his own body, which clause could have no respect to his oyes, but to the sons to be gotten immediately by himself.

Act. Lawrie.

Alt. Nicolson, elder.

Clerk, Scot.

Fol. Dic. v. 1. p. 188. Durie, p. 115.

1630. January 27.

TURNBULL against COLMESLIE.

No 3.

The clause in a contract of marriage *si sine liberis*, was found not to take place where there was a son born who survived his mother, but died without being served heir; so that in this case, the tocher was found not reputable, which it was to have been, if the mother had died without children.

By contract of marriage betwixt Turnbull of Barnhills and Colmeslie's daughter, Turnbull being obliged, in case his wife deceased without heirs on life procreate betwixt them, to succeed to his lands of Barnhills, in that case to repay 4000 merks which he had received in tocher, at the next term after his spouse's decease; and there being a son procreate betwixt them, who survived after the mother seven years, and lived that space after her, her husband being also dead, the bairn being dead and never served heir to his father, nor entered to the lands foresaids; it being questioned in the suspension betwixt the parties (that contract being registered by Colmeslie's assignee) if the money was due to be re-paid by the heir of the umquhile husband, against whom the contract was registered, seeing he *alleged*, that the case of the contract had not fallen out, in so far as there was a bairn procreate on life the time of the wife's decease, and who lived after her many years; the LORDS suspended the letters *simpliciter*, it being proven that there was a bairn on life, procreate of that marriage the time when the mother died, and who lived diverse years after her; for the LORDS found, that albeit that bairn was not served heir to his father of that marriage, nor entered to the lands contained in the contract, and so had not succeeded thereto; yet he being the bairn of that marriage, who might have been heir, and was so in blood, that *failzie* of the contract was purged thereby, seeing these words in the contract, mentioning the heirs of the marriage, and not bearing heirs served and retoured of that marriage, is not to be understood but of bairns of that marriage; for the words, viz. 'heirs procreate,' ought to be so understood, seeing none can be procreate heirs, but they that are procreate bairns, and thereafter served heirs; and the contract obliging the son-in-law to refund the sum at the next term after his wife's decease, could not take effect, seeing the bairn lived seven years after her, and so the charges were suspended.

June 16.—This cause being of new heard again, this decision was followed, and the words of the contract, viz. 'of an heir to succeed to the lands,' was un-

derstood of a bairn surviving, who had possibility to succeed, albeit he had never succeeded; for the father might have sold the lands, albeit the son were living, and so he could not succeed.

No 3.

Act. *Mowat & Stuart.*Alt. *Nicolson & Craig.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 187. Durie, p. 486.*

*** Auchinleck reports the same case :

IN a contract of marriage betwixt Kaircrows and his daughter on the one part, and Turnbull on the other part, it is provided, that the tocher shall be re-paid at the next term after the decease of the woman, in case there shall be no bairns procreated of their marriage to succeed to the Laird of Turnbull. There is a son procreated of that marriage, who outlives his father and mother by the space of seven years, but was never served heir. After his son's decease, Kaircrows charges for restitution of the tocher, conform to the contract of marriage. Turnbull suspends, that the tocher cannot be restored by virtue of the clause of the contract, because there was a son procreated who outlived the mother, and might have been served heir; and, the meaning of the contract was, that the tocher should only have been re-paid in case there should have been no bairns procreated of the marriage, which may be gathered by the words of the contract, wherein the tocher is ordained to be re-paid at the next term after the decease of the woman; and, seeing her son survived her, it argues plainly the meaning of the contract was the re-payment to have been made in case she deceased without bairns, which the LORDS found relevant, and suspended the letters *simpliciter*, 27th January 1630, and this same disputed 26th July 1630, and decided *ut supra*.

*Auchinleck, MS. p. 6.*1630. *June 26.*CROMBULL *against* CAIRNORE.

IN contracts of marriage, found that the clause of re-payment of the tocher in case of the decease of the woman without heirs of the marriage, cannot infer payment of the money where there was a bairn procreate, who lived till after the mother's decease, albeit not entered heir nor retoured.

*Fol. Dic. v. 1. p. 187. Kerse, MS. fol. 65.*1663. *January 31.*FORSYTH *against* MORISON.

By contract of marriage betwixt James Morison and Agnes Forsyth, he is obliged to employ 8000 merks to them and the bairns of the marriage; provi-

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No 4.

Found as above; and seems to be the same case under different names.

No 5.

A wife, in her contract of marriage, ha-

No 5.
ving accepted
a certain sum,
for all she
could crave
by her hus-
band's de-
cease, in case
there were no
issue of the
marriage, the
restriction
was found not
to take place,
as there was
one child
who survived
the mother.

ding, that if it shall happen Agnes to die before her husband, having no bairns on life, James is obliged to refund L. 1000 of her tocher to her or her executor in satisfaction of his moveables; and which provision, she for her and them, accepts in satisfaction foresaid. Agnes dies, having a child, and thereafter both child and father dies, and Mr James Forsyth, brother and executor to his sister Agnes, pursues Archibald Morison, as executor to his brother James, for a third of James's moveables, there being bairns of a former marriage. It was *alleged*, The pursuer could not have a third, because his sister had accepted L. 1000 in contentation, &c. It was *answered*, The clause was conditional, in case there should be no bairns. *Replied*, Though the words of the condition be only 'in case there should be no bairns,' yet the intention of the parties *et quoad actum est* certain has been, whether bairns or not; because, her interest in his moveables was more favourable, having no bairns, than having bairns; and therefore, the clause limiting her in case of no bairns, should *multo magis* limit her having bairns; the sense of which clause ought to be extended *ex præsumptiva voluntate contrahentium*, though the words be omitted by the writer; for which also, certain passages were adduced from the civil law in the matter of wills *institutione*, and substitution of heirs vulgar and pupilar. *Duplied*, That conditions in contracts are *stricti juris, secus in ultimis voluntatibus*; that the words were clear, without ambiguity; that the case was favourable for the relict's executor, seeing she was craving no more than what the law would have given her, if the contract had not been; that nothing could take from her the benefit of the law, but her own express paction, and no pretended tacit presumption could do it; and yet, against that presumption it may be thought, and not improbably, that she intended less to herself, having no children, than having children; because, having children, it may be thought, she was careful to have the larger portion for their provision. *2do*, It was *alleged* absolutor for the whole, because there was a son living after the mother, who, if he had been confirmed executor, her third would have appertained to him, and consequently to his executors the nearest of kin on the father's side: Now, that he was not confirmed executor, was not his fault, and it ought not to prejudge his executor, because he did what he could for the time; but then, there was no commissariot courts, and instruments and protestations were taken for him, of his willingness to confirm, &c. So, that there being a surcease of justice, *impedimentum juris quod non potest provideri ne remederi impedito non debet nocere*. *Answered*, That such impediments cannot hinder the ordinary course of law, no more in succession of moveables than of heritage: Now, though an heir had been served and retoured; yea, though he had charged the superior to infeft, yet, unless he had been actually *vestitus et sasitus*, the heritage does fall, as if he had never been served; even so in moveables, and in confirmation of testaments; and such an impediment being *casus fortuitus*, it must have its own hazard and event as to the interest of parties, but not to alter the course of law.

THE LORDS repelled both the allegances.

Fol. Dir. v. 1. p. 188. Gilmour, No 78. p. 57.

1663. February 17. Mr JAMES FORSYTH *against* ARCHIBALD PATOUN.

MR JAMES FORSYTH, as executor confirmed to his sister, pursues the said Archibald Patoun her husband, for payment of her third of his free goods, at the time of her death. The defender *alleged, First*, By the deceased wife's contract of marriage with the defender, she accepted L. 1000 for all she could crave by his decease, in case there were no bairns of the marriage, and albeit there was a bairn surviving her, yet the bairn shortly thereafter died.

THE LORDS repelled this defence, and found that the bairn surviving the mother never so short was enough.

It was further *alleged* absolvitor, because the deceased wife having a child surviving her, her share belonged to that child, as nearest of kin, and the child being dead, belongs to the defender, the child's father, as nearest of kin to the child, and cannot go back to the mother's nearest of kin; because there is no succession of cognates in Scotland. The pursuer *answered*, That if the child had been executor confirmed to the mother *ad eund. hæreditat.* would transmit the same to the father; but, there being no confirmation, *hæreditas mobilium jacebat*, and the goods remain yet still *in bonis defuncti maritis*; and albeit it was found in the case of Bells *contra* Wilkies,* that it was not necessary to transmit moveables, that the testament were execute; yet, in that case it was a confirmation, which was esteemed an addition. The defender *answered*, That he had done diligence to have it confirmed, but during the child's life, all judicatories were stopped, and he had taken instruments of his desire to be confirmed; and *alleged*, That as bairns surviving would transmit their legitim though they had done no diligence, so this bairn surviving alone was sufficient.

THE LORDS found, That seeing there was no confirmation, the right was not established in the child's person, and that the right could not fall to the father, but fell to the nearest of kin of the mother, and found it was not like a legitim, which is only of the father's means, and not of the mother's, and hath a special privilege in law, to be transmitted by mere superviving. *See* LEGITIM.

Fol. Dic. v. 1. p. 188. Stair, v. 1. p. 180.

1676. June 27. EARL OF DUMFERMLING *against* The EARL OF CALLENDAR.

IN April 1633, there is a minute subscribed by the Earl of Callendar, bearing, 'That he being to solemnize the marriage with Margaret Countess of Dumfermling, the minute or contract is to be amplified thereafter, containing these heads, viz. I bind and oblige me, my heirs and assignees, to infest and seise in conjunct fee and liferent, the said dame Margaret in the barony of Livingston, &c. and likewise by these presents, obliges myself, my heirs and as-

No 6.

Found as above; and seems to be the same case under different names.

No 7.

A provision of conquest to a wife 'in case there be no children of the marriage,' was found not executed by

* *See* SERVICE and CONFIRMATION.

No 7.
the existence
of a child,
who died the
same day that
he was born.

signees, that of all and whatsoever lands, or sums of money, which shall be purchased during our lifetimes together, (our debts being first paid) there shall be sufficient security thereof made in liferent as of the former lands to the said dame Margaret, in case of no issue of children, the one half thereof to be disposed upon, as the said dame Margaret shall think fit; and thereafter in September 1633, the Earl renounceth his right to the Lady's jointure, and obligeth himself not to meddle with it, but by her warrant in writ.' This Earl of Dumfermling, as assignee by his father, who is heir to the Countess, did pursue both the late Earl of Callendar, and this Earl of Callendar, as he who hath accepted a disposition of the late Earl's estate, without any cause onerous in prejudice of these obligations, to fulfil the same: And, after the late Earl's death, insists against this Earl, who *alleged* absolvitor, because the conclusion now insisted on, being to denude of the half of the conquest, and to pay the bygone rent thereof since the Countess's death, which was in anno 1659, by virtue of the clause of conquest in the said minute, the said clause is conditional 'in case of no issue of children;' *ita est*, There was a child born, which excludes the condition, and evacuates the provision. The pursuer *answered*, That the existency of the child born of this marriage, and who died that same day that it was born, doth not exclude the condition, whether respect be had precisely to the words, or to the meaning of the parties arising from their condition, interest, and acting; for the terms of the condition are, 'in case of no issue of children,' which cannot be understood as if the clause had been conceived thus, 'in case there be children of the marriage, the Lady should have no interest in the conquest,' for then the condition being positive, it might be pretended to have taken effect by the existence of a child; but this clause is negative, 'in case there being no issue of children;' and therefore, if at any time of the marriage there were no children, the condition took place, whether by the childrens simple non-existency or deficiency; for if the Lady had been then pursuing her husband to fulfil this provision, and to infeft her in conjunct fee in the conquest, she would have been well founded on the clause, subsuming 'that there are no children;' and it would not be a good answer, that there had been children of the marriage; and seeing this minute bears, 'not only the not being of children,' but 'in case of no issue of children,' it makes the matter much more clear, for the word *issue* were superfluous, if the simple existency of children did exclude the provision, but *issue* being a word customary in the English law and writs, but not with us, it doth there import succession, posterity, and so relateth to the dissolution of the marriage, and must be understood as that *formula* debated by the Doctors, *si sine liberis decesserit*, or *deficientibus liberis*, which still respects the dissolution of the marriage, and imports a permanency, and cannot be purified by a momentary existence; and accordingly, the LORDS have been always accustomed to interpret the ordinary clauses in contracts of marriage, 'in case there be no children,' or 'failzieing of children,' that the tocher should return or the jointure be increased by the survivency,

and not by the simple existency of children, as hath been frequently decided. *2do*, If the meaning of parties be considered, which is the best way to interpret a dubious expression, the case must be considered, as if the husband and wife were disputing the extention of the minute, before either children or conquest, and then it is to be considered, if this case had been proposed to the parties at the time of the minute, what if a child be born, and die in some few days, would the Lady have acquiesced to quit the conquest? Or would the husband quit the marriage before he extended it further, which cannot with any reason be thought, especially seeing he had only then the barony of Livingstoun, not exceeding 7000 merks of rent, and the Lady had a liferent of 22,000 merks by year, with money and moveables, and was a young and strong woman, and the husband had no visible way of making conquest but by her means; for what he had acquired, was abroad in the war, which he had quit, and settled at home by this marriage; so that being illiterate, and a most profound peace in the country in anno 1663, there was no ground of expecting conquest but by the jointure; and therefore, whether the words or meaning be considered, the simple existence of a child is not relevant. The defender *replied*, That 'issue of children' imports no more than the existence of children, and amongst illiterate parties, words are oftentimes superfluous; neither can the clause be understood as equivalent to that *formula*, *si sine liberis decesserit*, which clearly implies that the want of children is at the time of death; but this clause is equivalent to this *formula*, *si liberos non habuerit, si liberos non suscepit*; and it is clear, that in the condition introduced by law, that if the marriage dissolve within year and day without children, all things betwixt man and wife return *hinc inde*, the simple existence of children is sufficient; and if that be not sufficient in this case, then, though there had been twenty children come to maturity, and married, if they and their *issue* had died before the parents, the Lady would have recurred to her share of the conquest, which had been very unreasonable. It was *duplicated*, That all the conditions alleged by the defender express a peculiar time, viz. the 'procreation or birth of the children;' so that if here the clause had said, 'in case there were no children procreate,' or 'in case there were no children born,' their birth evacuates the condition; and, in the same manner, the law determines the time of existence, or non-existence of children to dissolve the marriage, viz. 'if either party die within year and day, without children procreate, heard cry,' and so their birth and maturity by crying and weeping, determines the time, which doth noways quadrate to this clause, 'if there be no issue of children,' which at least must import the ordinary clause 'of failing of children.'

THE LORDS found that the existency of a child, who died that day, did not evacuate the condition in this minute, and therefore repelled the defences founded thereon.

In this process there was a second defence proponed, and debated the 28th day of June.—It was *alleged* for the Earl of Callendar defender, absolutor, be-

No. 7.

cause the clause in the minute founded upon, could only import a liferent to the deceased Lady, with a power to dispose on the one half of the conquest as she thought fit, which is but a personal faculty, incommunicable to heirs and assignees, such as is ordinary in dispositions by fathers to their children, reserving to themselves power to burden or affect, which is never extended to heirs; and it cannot be subsumed that the Lady did dispose. And seeing the clause is imperfect and dubious, *in dubiis quod minus est et quod benignius est sequendum*; and certainly the personal faculty is less than the property, and more suitable to the interest of both parties; for thereby the wife, if she had pleased, might have disposed of the half, and yet the husband had hopes that he might prevail with her, not to dispose, as he did; but if the meaning were to give her the fee of the half, which being the most important right, it would have been expressed *in verbis translatis dominii*; and if stretched further, would be an extravagant unreasonable provision, which was never in a contract betwixt noble persons, whereby a wife should not only have the liferent of all the husband had, but of all that he should acquire; and likewise the fee of the half of his conquest, in case there was no issue. 2do, In conjunct fees betwixt man and wife, where the heirs are not expressed, which may clear who is fiar, the law presumes *quod potior est conditio masculi*, that the husband is fiar, and the wife only liferenter; and therefore it must be so in this case. 3tio, The clause of conquest bears, that the conquest should be secured to the wife in liferent, as the barony of Livingston; but it is undeniable that the security of the barony of Livingston was to be in conjunct fee and liferent, whereby the husband was fiar, and the wife liferenter; and therefore the security of the conquest being expressly regulated thereby, behoved to state the husband fiar, and the wife liferenter; and so her power to dispose is no act of property, but a personal faculty.—It was answered for the pursuer, That the clause of conquest, as to the import thereof, must either be considered precisely according to the words in the minute, and the terms in which the Lords could have extended a contract of marriage thereupon, or according to the meaning of the parties, to be elicited from the circumstances; and if the Lords were extending the minute, without any speciality of circumstance, they could only extend it thus, That seeing both the barony of Livingston, and the conquest, were to be by way of conjunct fee, and that heirs are expressed in neither, that the husband and his heirs would be obliged to infest himself and his spouse, the longest liver of them two in conjunct fee and liferent, and their heirs, or the heirs of the marriage, without expressing, which failing, &c. So that it would be left to the interpretation and construction of law, whether the husband were sole fiar, or whether the husband was fiar in the one half, and the wife in the other half; in which case the common presumption of law would construct the husband to be sole fiar, and the wife to be only liferenter, unless there were a stronger presumption or evidence in the contrary; and so the husband would be sole fiar of the barony of Livingston, because there is no presumption or evidence in the

contrary ; but the conjunct infeftment of the conquest behoved to run in these terms, That the husband should take his conquest to himself and his wife, the longest liver of them two in conjunct fee or liferent, and to their heirs ; and in case there were no issue of children of the marriage, that the one half should be disposed of as the wife should think fit ; by which conjunct fee, the presumption of law that the husband is sole fiar, is taken off by that adjection, that the wife being conjunct fiar, hath power to dispose on the one half, which is a sufficient evidence to take off the presumption, and to make the wife fiar of the half ; for it is beyond question, that a conjunct fee granted to two men, the longest liver of them two, and their heirs, would have this effect, that both are fiars equally in the half, and that the survivor hath the liferent of the whole, and therefore they are said to be infeft in conjunct fee and liferent, because they are both fiars of the half, and they are both liferenters of the other half, as they happen to survive ; but the only reason wherefore a conjunct fee to man and wife constitutes the man sole fiar, and the wife liferenter, is the presumption, that that is the meaning and intention of parties, which presumption, as all other presumptions are, is elided by a stronger presumption in the contrary ; as if an heretrix resign her lands in favour of herself and her husband, the longest liver of them two in conjunct fee, and their heirs ; if this be not done by contract of marriage, or as a tocher, as it frequently occurs, that after contract of marriage, and marriage following, the wife succeeds to an estate, which, if she resign in manner foresaid, and she and her husband be infeft thereupon in conjunct fee, and their heirs, without expressing further, the wife will be sole fiar, and the husband only liferenter ; because the presumption is stronger for the wife, that her meaning was, not to denude herself of the fee ; but the case is much stronger here, where it is not left to presumption whether the wife be only liferenter, or fiar in the half, but it is expressly agreed to by both parties, that the wife should have power to dispose of the one half, if there were no issue or children ; so that the precise question comes to be, whether a wife, being infeft in conjunct fee, with power to dispose of the one half as she pleases, be fiar of that half, or if she hath only power to dispose of that which is not her own but her husband's ; and it is very clear that that clause adjected takes off the presumption, and leaves the wife according to the nature of conjunct fee, to be fiar of the one half ; and as to the meaning of the parties to be elicite from special circumstances, it makes strongly for the wife to be fiar of the half ; *1mo*, Because the clause bears expressly, that her conjunct fee of the conquest is to be with the burden of their debt ; and therefore must be meant of the property ; for a liferenter was never burdened with debt ; *2do*, It is acknowledged that the husband had only an estate of 7000 merks a-year, and that the wife had a liferent of 22,000 merks a-year, and was a young and healthful woman about 30 years of age ; so that she had a better estate than he, which is very extraordinary ; and therefore, though this clause of conquest were extraordinary, yet it was very reasonable ; and if it had been directly proposed,

No 7.

the husband would not have relinquished the marriage, but rather have yielded to it ; nor would the Lady have gone on without it, seeing there was no visible way of making conquest but by the Lady's great liferent ; for the husband was an illiterate man, and could make no improvement of his fortune but by his sword, by which he acquired abroad the money that bought the barony of Livingston ; but he had deserted that service, and settled at home by this marriage ; and though he gained in the civil war that ensued at home, yet there was no thoughts of that war in April 1633, the time of the minute ; *3tio*, The meaning of parties is yet further cleared by a bond granted by the husband, bearing date in September 1633, and which the defender hath pleaded to be of a later date, as after the marriage complete, whereby the husband renounces his *jus mariti*, and gives his Lady the sole disposal of her opulent jointure, which is much more extraordinary than the half of the jointure, in case of no issue ; and if this posterior bond had been granted the time of the minute, it might have been a cause to have limited the ground of the conjunct fee ; which being so long after, it can be no ground at all.

THE LORDS found, That by the terms of the clause of conquest, and by the meaning of parties elicite from the circumstances foresaid, it did not import a naked liferent, with a personal faculty to the Lady to dispoise the half ; but that she being conjunct fiar with that power, was fiar of the one half of the conquest ; for albeit the conquest, in the manner of security, was regulate by the infeftment of Livingston, both being conjunct fiars ; yet the power of disposal not being in the conjunct fee of Livingston, but of the conquest, it made the security, as differing in that point, to have different effects as to the fee ; but seeing this clause was but a general clause of conquest, the Lords found that it could only extend to what the husband acquired during the marriage, more than what he had the time of the minute, and with the burden of all his debts contracted during the marriage ; so that though the whole estate he now hath, was acquired during the marriage, yet as much of it as was equivalent to the barony of Livingston, was not to be reached by the clause of conquest, but only the superplus that were free, over and above the debt contracted during the marriage, of which free superplus the pursuer, as succeeding to the Lady, was to have the half, but no part of the bygone rents from the Lady's death till her husband's death, because they belonged to the husband, as the surviving conjunct fiar. See This case by Dirleton, *voce* FACULTY.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 430.

1677. January 11. BAILLIE against SOMMERVILLE.

No 8.

The clause,
et sine liberis
found not to
take place,

LITTLEGILL having charged Mr William Sommerville to make payment of the sum of 10,000 merks, contained in his contract of marriage with Mr William's daughter, and upon a bond of corroboration, and a decret of consent ; there

was a bill of suspension given in, bearing several reasons, which the Lords discust upon the bill; the *first* was, that his consent to the decret was the day before he should have been execute, being in prison for a slaughter, upon Littlegill's promise to get him a remission; and for the bond of corroboration, it was extorted for fear of losing his escheat, being charged with horning upon the contract of marriage; and having presented a bill of suspension, it was unjustly refused, the reason of that bill being, that the contract had a special condition, that if his daughter did die within six years, there being no children of the marriage then alive, and that if Sommerville himself had an heir of his own body, that then he should have repetition of the half of the tocher, if it were paid; but so it is, that his daughter died within a few years, as likewise the child of the marriage died thereafter, and Sommerville had an heir of his own body. The *second* reason was compensation, founded upon a ticket granted by Littlegill, to be comptable to him for the half of the benefit of a commission of Chamberlain, granted by the Marquis of Douglas.—It was *answered* to the *first*, That the decret was opposed, being *in foro* upon consent; and Sommerville was not imprisoned nor processed at Littlegill's instance, who denied that ever he made any such promise; and for the bond of corroboration, it was voluntarily granted, and the refusing of a bill of suspension could not be interpreted *metus causa*, he never having complained thereof, nor given in a new bill; and for the condition of the contract of marriage, it was clearly copulative, being conceived in these words, that in case there were no heirs of the marriage, and also that Sommerville had an heir of his own body.—It was *replied* to the *last*, which was the only point that the Lords considered, as being the ground whereupon the bond of corroboration and decret were founded, if the condition was disjunctive and not copulative; and albeit it did bear these words, (and also) yet it ought to be interpreted (or if,) many lawyers being of that opinion, that where several conditions are set down and conjoined with the word *item*, it ought to be interpreted disjunctive, *in resolutione orationis*; and in this case it is presumed in law that it was so intended, Sommerville's daughter being only Littlegill's second wife, and Sommerville being a man of no great fortune.—THE LORDS considered the contract of marriage and the foresaid condition several times, and at last did all resolve, that the condition was copulative and not disjunctive, being conceived in these terms, that if the Lady should die within six years before her husband, without any child of the marriage, and also that Sommerville should have heirs of his own body, that then he should repay 5000 merks; both which not having existed, there being a son of the marriage who survived his mother, the condition did thereby exist; and so they decerned the whole tocher to be paid.

Fol. Dic. v. 1. p. 187. Gosford, MS. No 936.

No 8.

where a child had been born of the marriage, although the child died, but after his mother, whose tocher was to return in case of no children.

1680. June 18.

OSWALD against BOYD.

No 9.

A clause in a contract, that a part of the tocher should return to the father, in case his daughter died without children of the marriage, was found to infer the return, though the children were born, but died without issue before their mother.

By contract of marriage betwixt the Laird of Glenhoove and Jean Oswald, it is provided, ' That in case the said Jean depart this life without bairns lawfully ' procreate of the marriage, in that case the husband was obliged to pay 2000 ' merks of the tocher to the father ;' whereupon Oswald, as having right to the sum, pursues Mr Robert Boyd, as representing Glenhoove, to pay the sum, who *alleged* absolvitor, because he offered to prove there were bairns procreate of the marriage.—It was *answered, non relevat*, unless they survived their mother ; this being in effect the common clause, *si sine liberis decesserit*, which takes place if the children survive not ; and albeit in some cases the existence of the children purifies the condition, yet such clauses ought always to be interpreted according to the interest, and the presumed will and design of the contractors, which can be no other in this case, but that the wife's father provided a return to himself, of a part of the tocher, if his interest of the family failed by his daughter's having no issue, which holds alike as if there had been no children procreate, or whether they died before their mother ; and though the clause mentions children procreate, yet that is only adjoined to restrict the provision to the children of the marriage.

THE LORDS found, That the survivency, and not the existence of children procreate of the marriage, was understood ; and therefore found the same to return, seeing the children procreate died without issue before their mother.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 771.

* * Fountainhall reports the same case, giving the defender the name of Somerville :

ONE is pursued to restore 2000 merks of tocher on this ground, that the contract of marriage bore this clause, ' in case the wife should decease without any ' children lawfully procreate of her body, then 2000 merks of the tocher should ' be repaid by her husband and his heirs to the wife's heirs ;' but *ita est*, they subsume she had no children that survived herself ; and so the case existed, and the condition was purified. *Alleged*, There were children procreate of the marriage, and they lived seven years after the dissolution thereof, which happened by the husband's decease, and so she not having died without children, there was no ground for seeking back the said 2000 merks of the tocher. *Replied*, This condition *si sine liberis decesserit, non respicit tempus præteritum*, but only the present time when she deceases ; and seeing she had no children who outlived her, there was clearly place for restitution of the tocher. ' THE LORDS found there was room for returning the said 2000 merks of tocher, since she died without children surviving her.' This was done to confirm Dumfermline's interlocutor against Lord Almond, upon which the appeal was given in, in Ja-

nuary 1674; though the word in that case was *issue*, and is of a more general signification than the word *children*; for it extends *etiam ad nepotes aliosque posteros*.

No 9.

Fountainball, v. 1. p. 102.

1681. November 29.

The LADY KINCARDINE *against* The EARL'S REAL CREDITORS by infestment.

No 10.

THE Earl of Kincardine having granted a bond for implement of his contract of marriage, for securing of 80,000 gilders on land in favours of his Lady, in case of no children of the marriage, or of their dying before the age of 20, so as they might and did dispose of the same; with a resolute clause making void the infestment, in case of the children's attaining to that age.

THE LORDS found, That the provision irritating the infestment was to be strictly interpreted; and that it took effect by any of the children's attaining to the age of twenty, though they did not dispose of the sum; and would not supply the words, *so as they may and do dispose*, as an omission, although they were mentioned in the narrative and procuratory and requisition, and the charter; and found, That the infestment was not a fiduciary security to the children, but only a security to the Lady of her right in the foresaid event.

Fol. Dic. v. 1. p. 188. Harcarse, (INFESTMENT.) No 583. p. 162.

1686. December 7.

DEACON THOMAS SOMERVILLE *against* CAPTAIN WILLIAM TENANT.

No 11.

IN the action pursued by Deacon Thomas Somerville taylor in Edinburgh, for the behoof of Somerville of Drum, against Captain William Tenant, skipper in Kirkcaldy, for declaring the disposition granted to him by Tenant of Cairns was altered and revoked by him on death-bed, conform to his faculty, and a new one ordained to be drawn, and he died before that was got done and subscribed; and it being *answered*, That he made no alteration as to Captain Tenant's succeeding him, but only ordained the tailzie to be rectified, that it should only belong to the heirs-male of the substitutes; the LORDS, before answer, allowed a mutual probation on the matter of fact alleged *hinc inde*; and Captain Tenant adducing John Paterson the writer whom Cairns entrusted with the renewing the disposition, Drum gave in sundry objections against him, viz. that he had voluntarily given up the disposition to the Captain, and had instigated him to this plea, and joined with him at consultations, and carried himself

Lands were tailzied to heirs-male, with a clause in favour of daughters, *in case there be no heirs-male*. There was an heir-male, but he died before the daughters, and the King succeeded as *ultimus hæres*. The provision to the daughters found to have failed.

No 11.

partial. THE LORDS, on report, ordained him to purge himself upon oath, and received him.

1687. December 9.—THE case of Somerville of Drum, and the heirs of line of Tenant of Cairns, against Captain William Tenant, mentioned 7th December 1686, is decided. By contract of marriage in 1637, the lands of Listonshiells were provided to the heir-male of the marriage; whilk failing, to James Tenant of Cairns his other heirs-male: The heirs-male all failing, Hugh Wallace of Inglistown, takes the gift of *ultimus hæres*, and assigns it to Captain Tenant, who pursues a declarator, wherein Cairns' sisters, as heirs of line, repeat a reduction of the gift, and contract whereupon it proceeds, upon this reason, that by a minute of contract in 1634, prior to that contract, these lands were provided to the heirs whatsoever, and inhibition was served on it; and so the heirs of line of that marriage could not be prejudged by the subsequent contract. *Answered*, *imo*, That was only a destination, and so could not hinder James Tenant to alter it, by taking his lands afterwards to his heirs-male. *2do*, John the father, who was fiar, entered not into that first minute, and was not inhibited, (though the inhibition be also prescribed,) and in the second contract he disposes the lands to James, his son and apparent heir, and would give them no otherwise than to the heirs-male. *Replied*, There was an obligation, so soon as James the son came to the fee of the lands, to take them to his heirs whatsoever, conform to the first minute; and *jus superveniens jure accrescendi* belonged to the heirs of line; and if such provisions were mere destinations, not obligatory, it would evacuate all contracts matrimonial. *Queritur*, If Captain Tenant may be reached, as having received a disposition from the son of that James who was obliged in the minnte, and which son entered heir by a precept of *clare constat*?

THE LORDS found the donatar to the *ultimus hæres* had right, and that the heirs of line had none; and therefore declared the gift; and also assoilzied Captain Tenant from Drum's reduction. Upon a bill, Drum procured a new hearing which was not till the Summer Session.

1688. January 25.—THE reduction at the instance of Somerville of Drum, and the heirs of line of Cairns, of a disposition granted by Cairns to Captain Tenant, as mentioned 7th December 1686, is advised. The reason of reduction was, that it was blank in the name; and though he subscribed a warrant to Walter Johnston, the writer of it, or any other, to fill up the Captain's name in it, yet that warrant was null, Walter being one of the two witnesses in it himself; and *non constat* when Mr John Carmonth filled it up: it might have been *in lecto*, or after Cairns' death; and it is proven by the witnesses, that he was going to rive it, and ordered a new one to be drawn, which was never perfected; and so this was revoked. *Answered*, It appears by the testimonies,

Captain Tenant's name was filled up a year before Cairns' sickness, and Mr Carmichael can depone on it: And, as to the alteration of his mind, it is evident he never designed to take it from Captain Tenant, but only to alter it in the substitution and tailzie from his heirs whosoever to his heirs-male; and from § 7. *Institut. quib. modis testamenta infirmis*. it is clear, this is not a sufficient revocation, unless the posterior testament or disposition were perfected: And the LORDS have decided so, 23d July 1669, Elies against Inglistoun, *voce* WRIT; and that l. 30. *C. de testament.* though cited by Drum, yet makes against him. THE LORDS sustained the disposition, assoilzied from the reduction, and preferred Captain Tenant to the mails and duties.

1688. July 25.—THE LORDS having of new advised Captain Tenant's case with Somerville of Drum, mentioned 9th December 1697, they adhered and explained their interlocutor in these terms. THE LORDS having advised the debate, and writs produced for either party, they find that, either in an original feu, or posterior infeftment of tailzie, where the provision is in favours of the heirs-male and assignees whosoever, that the heirs of line cannot succeed, but that the right does devolve to the King as *ultimus hæres*: And find, that the minute being in these terms, to infeft in all lands wherein the father was infeft, whereunto he had presently right, were taxative and restrictive, and would not comprehend the lands of Listonshiells, wherein the father was not then infeft: And also find, that the obligation in the minute being conceived to obtain himself, and his wife, infeft in conjunct fee and liferent, and the heirs of the marriage, imported no more than a destination in favours of the heirs, and would not hinder; but his father, who was not a party-contractor in the minute, having thereafter, in a contract of marriage (which was afterwards extended, bearing no relation to the minute, but only to the preceding marriage, and containing an addition of 1000 merks of tocher, and several alterations,) provided the lands to the son, and to the heirs-male of his body; which failing to his heirs-male and assignees whatsoever, albeit the son was heir by the conception, yet he was not obliged to alter the destination in favours of the heirs-male, neither were the heirs-male obliged to alter the same, albeit the minute had imported an obligation upon the son, not being obliged to fulfil obligations which are inconsistent with, and do evacuate the tailzie; and besides, that the minute did import no obligation upon the son, but only a destination of tailzie or succession: As also find, that albeit the tocher was applied for purging the wadset of 5000 merks, which did affect the lands of Listonshiells, yet that did not make the lands to be conquest in the person of the son; but being provided by the contract of marriage as aforesaid, was *præceptio hæreditatis*; so that, albeit the son was obliged to provide the conquest to the heirs of marriage, yet the obligation of conquest could not comprehend these lands.

Drum having lost his point, he then insisted for 6000 merks, upon this ground, that, by the contract of marriage, it was provided, in case there were:

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no heirs-male of the marriage, and the estate went to Cairns' other heir-male, then they should pay to the daughter 6000 merks; and subsumed that the heir-male of that marriage having now failed, that therefore the donatar, who was liable for all debts, may pay that 6000 merks to the daughters. *Answered, 1mo*, This was not a substitution, but a condition, in case there were no heirs-male of the marriage, which did not exist; for there was a son, who was not only *heres potestative, et in sanguine per jus apparentiæ*, but also *actu*, by entering on a precept of *clare constat*. *2do*, The daughters had got portions, and renounced. *3tio*, They were not excluded by any deed of their father or good-sire, as the clause runs, but by a deed of their brother's, which is not provided against. THE LORDS having advised this debate, upon the 27th July, they found, he having existed and being served heir, the provision to the daughters vanished. The words were, Found that the clause in the contract, in favours of the daughters, being, that in case there be no heirs-male of the marriage, and that the said daughters be secluded from the lands and lairdship of Cairns, by a tailzie made, or to be made, by the said John, or James his son, or either of them; then, and in that case, the heirs-male, and of tailzie, succeeding thereto, shall be holden to content and pay to the daughters of the said marriage, the sum of 6000 merks; and there being an heir-male of the marriage who was served and retoured, and lived many years, that the condition of the daughter's provision did fail; and therefore assoilzie.

Fol. Dic. v. 1. p. 188. Fountainhall, v. 1. p. 434. 488. 493. 513.

No 12.

There being a provision in a contract, that in case the husband died before his wife, leaving children, one or more, unprovided, and unforisfamiliatæ, then she should restrict her jointure to the half; and one child having survived the father, and died within a few months after, the relict was pursued to restrict. Alleged for the defender, The clause of the contract was calculated

1687. November 22. WILLIAM ROBERTSON against ELISABETH BINNING.

THERE being a provision in a contract, that in case the husband died before his wife, leaving children, one or more, unprovided, and unforisfamiliatæ, then she should restrict her jointure to the half; and one child having survived the father, and died within a few months after, the relict was pursued to restrict.

Alleged for the defender; That the deceased surviving child being heir, and having both the fee and some tenements unliferented, cannot be said unprovided. 2. The clause of the contract was calculated for a subsistence of the children, who now are dead, and so need none.

Answered: By children unprovided we are not to understand such as have no legal provision, but such as have no bonds of provision.

THE LORDS found the wife ought to restrict to the half.

Fol. Dic. v. 1. p. 188. Harcarse, (CONTRACT OF MARRIAGE.) No 389. p. 102.

* * Fountainhall reports the same case:

SHE had a liferent of some houses in Cupar of Fife from her husband, his brother, with this quality, that if there were children at the time of his death,

she should restrict it to the half; and he subsumes there was a child surviving the father. *Answered*, The clause runs, 'children unprovided or unforisfamlie the time of his death;' but so it is he was the only child of the marriage, and had the fee of the hail, and so could not be interpreted a child unprovided. *Replied*, He had no provision from his father by any destination, and if she liferented all this house, then he had little or nothing in her lifetime. This being reported by Carse, THE LORDS found the existing of one child purifies the condition of the restriction contained in the bond, and therefore that the mother ought to restrict accordingly, notwithstanding of the words 'unprovided, and unforisfamlie.'

Fol. Dic. v. 1. p. 188. Fountainhall, v. 1. p. 481.

1687. December. BALLANTYNE of Corhouse against JOHN SCOT.

A WIFE being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, failing heirs procreate of the marriage, and there being a child of the marriage, who died before the dissolution thereof, the wife disposed of the 1000 merks in favours of her brother, who pursued for it after her decease.

Alleged for the husband; That the faculty was but a conditional negative, never purified; for there were heirs procreate, in so far as there was a child of the marriage, who was heir *potestate*; and bairns are not procreate heirs, the sense of the clause being *si liberos non suscepit*, and not *si sine liberos decesserit*. And the LORDS, in Turnbull's case, January 27. 1630, No 3. p. 2938. found the existence of a child, who died before dissolution of the marriage, did evacuate the provision in a clause 'failing heirs procreate to succeed to the lands;' and that by 'an heir to succeed,' was understood a child that might have succeeded.

Answered for the pursuer; That the clause bearing *heirs*, and not *bairns*, imported a surviving child. 2. It was the interest of the wife to have power to dispose of a part of her tocher, when it goes to strangers, which the bare existence of a child did not take off; so it was found in Dunfermling's case, June 1676, No 7. p. 2941., and in Oswald's case, June 1680, No 9. p. 2948., that the bare existence of a child, dying before dissolution of the marriage, did not evacuate a provision of this nature.

Replied: The clause in Dumfermling's contract was in case of no issue, and the clause in Oswald's case was in case the wife deceased without bairns procreate of the marriage; both which related to the period of the dissolution of the marriage, and not to the time of procreation.

'THE LORDS found, That the procreation and existence of the child did evacuate the provision, though it died before dissolution of the marriage.'

Fol. Dic. v. 1. 187. Harcase, (CONTRACT OF MARRIAGE.) No 392. p. 103.

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ed for a subsistence of the children, who now are dead, and so need none. The Lords found the wife ought to restrict to the half.

No 13.

A wife being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, failing heirs procreate of the marriage, and there being a child of the marriage, who died before the dissolution of it, the wife disposed of the 1000 merks in favour of her brother, who pursued for it after her decease. The Lords found, that the procreation and existence of the child evacuated the provision, though it died before the dissolution of the marriage.

No 14.

1688. July 12. WILLIAM SMEITON *against* THOMAS CUSHNEY.

It being provided in a contract, that the half of the tocher should return to the wife, in case she died without children on life, the LORDS found, That the existence of bairns, who died before the wife, did not evacuate the condition of the return of the tocher, as being *collata in tempus mortis uxoris*.

Fol. Dic. v. 1. p. 187. Harcarse, (CONTRACT OF MARRIAGE.) No 396. p. 104.

No 15.

1702. December 8. JOHN WATT *against* DAVID FORREST.

A deed contained this clause, "in case my whole children deceased, without heirs of their bodies, I oblige myself to pay a certain sum to my wife."

The children died, but one of them had had a son who had predeceased; and had not been served heir. The wife found to have no claim.

MR Robert Lauder of Gunsgreen, in his bond of provision among his children, subjoins a clause, that in case his whole bairns deceased without heirs gotten of their own bodies, then he obliged himself to pay to Anna Congalton, his lady, the sum of 5000 merks, being the tocher he received with her from the Laird of Congalton, her father. The said Anna assigns this obligation to John Watt, and he pursues David Forrest, one of the heirs portioners of the said Mr Robert, and of Major Lauder, his son, on this ground, that the condition had existed, in so far as the whole bairns of the said Mr Robert Lauder were now deceased, without leaving any heirs of their bodies. *Allaged*, Absolvitor from payment of this 5000 merks; because, though now there be no heirs existing of the said Mr Robert's body, yet his daughter Margaret left a son behind her, whereby the condition was extinguished. *Answered*, The bare existence and survivance of that child can never take away the lady's right, unless he had been served heir; and though he had, it would import nothing, because his uncle, Major Lauder, the said Robert's son, outlived him, and then deceased unmarried; and so Mr Robert's succession clearly *devenit in eum casum*, that all his bairns died without heirs gotten of their bodies. *Replied*, In these cases, heirs are to be understood *designative* for bairns, though not actually entered; and so it is taken in the feudal law, Gudelin. *de feudis, part 3. cap. 1.* Joannes a Sande, *decis. Fris. pag. 299*; and so have the Lords interpreted these clauses, No 3. p. 2938., Turnbull *contra* Colmeslie; that though it be spoken of heirs, yet the procreation of a son was enough, though never served: And accordingly the Lords decided here, that the son's surviving his mother was sufficient to extinguish the bond, seeing it could not be said that all Mr Robert's bairns died without heirs, and found that she nor her assignee had no right to the sum, but assoilzied the defender.

1705. December 28.—In the cause mentioned 8th December 1702, Watt *contra* Forrest; Watt, as creditor to Major Lauder, insisting against Forrest on the passive titles, as representing the said Major by progress, for payment; he *alleged*, That though he was served heir to his daughter, which daughter was

heir served to the Major, and so he may be thought to represent him by progress, yet he can never be liable on that service, it being *ipso jure* null, and done *per errorem*, in so far as he was not *proximior hæres* to his daughter at the time of the service, because his wife was with child at the time, and afterwards brought forth a daughter, who being nearer heir to her sister, clearly excluded him; and before that second daughter died, his wife was with child of a son, who is still alive, and is served heir to his sister, so his service as heir to his daughter, was preposterous and null; for *posthumus in utero habetur, pro jam nato*, so that he can never be heir, nor made liable to the hereditary debts; but if you would fix and constitute a debt, you must pursue his son, who is the true heir; and if he renounce, you must adjudge the *hereditas jacens*. *Vid. 22. D. de acund. et om. hæredit*;—*l. 12. C. de petit. hæredit*; and in the case of David Melvill now Earl of Leven, and the Duke of Rothes, in 1678, the Lords thought a remoter heir (though nearest *pro tempore*) could not serve while there was the hope and probability of the existence of a nearer *. *Answered*, His service was not null; for then *tractu temporis* it could not reconvalesce, but only was quarrellable and reducible at the instance of the nearer heir, when he came to exist, who might pursue him to denude in his favour, with the burden of the debts affecting the heritage; and Forrest could never quarrel his own service, on the pretence of a nearer, seeing he had procured both his own service and theirs; so he was excluded *personali exceptione doli*. The Lords thought if the lands wherein he was served heir to his daughter were adjudged by his creditors for his own debt, his son could reduce his service, and so *resoluto jure dantis*, his creditors diligence would fall in consequence, their author being found to have no right; and though formerly they found he could not impugn his own service and infeftment as heir, yet this day they altered that interlocutor, and found his service null, and so he was not liable except *in quantum* he had intromitted, as tutor and administrator to his son, the true heir; even as if a second son should serve heir to his father, and if afterwards his elder brother, then abroad, comes home, the first service becomes *ipso jure* null.

This was somewhat altered on a bill in January thereafter.

Fol. Dic. v. 1. 188. Fountainhall, v. 1. 164. 303.

1715. February 16.

LORD ROYSTON and LAIRD OF FRASERDALE against HALIBURTON of PITCUR.

THE Lord Royston and Fraserdale having wakened a process against Pitcur, wherein, as having right by progress from Sir George Mackenzie, they insist for payment of the annualrents of a bond due by the late Pitcur to Sir George, (the principal sum being payable to his heir of tailzie) Pitcur intents another process against them, as being executors by progress to the said Sir George, for pay-

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* See SUCCESSION.

No 16.

A bond being only to subsist failing children betwixt the granter and his wife, was found to be void by exist-

No 16.

ence of children of the marriage who survived the grantor, tho' they died before his wife without issue.

ment of a bond of 6000 merks granted by him to Margaret Haliburton, this Pitcur's sister, and failing her to Pitcur himself, payable at the next term after their attaining ten years of age; but the bond being lacerate in several places, so that some of the clauses and provisions could not be read, though the clause of registration, subscriptions, &c. were entire; and the LORDS having found, in another process, that the bond was not probative, in this new process the same grounds are again insisted on by the lawyers on either side, which nevertheless shall be here past over, because the interlocutor hereto subjoined takes no notice of them. But now, further, Pitcur having produced a declaration under the hand of my Lady Prestonhall, (who was first married to Sir George), importing, that she had procured from Sir George a bond of 10,000 merks in favour of her friends, and that the said bond was to subsist, failing of children of her body, with Sir George; but he having deceased, leaving children, who also deceased before their mother, and without issue.

It was *contended* for the executors; That granting such a declaration was sufficient to make up the lacerate clauses in the bond, yet that the import of it was, that if he had no children by her, then this bond was a kind of *fideicommiss*, whereby his other heirs were to be burdened; but if he had children, then the condition of the *fideicommiss* failing, it was to take no further place. And so it is expressly in l. 114. § 13. ff. *De legat. 1. cum quis erat rogatus (si sine liberis decesserit) per fidei commissum restituere, conditio defecisse videtur, si patri supervixerint liberi.* And l. 17. § 7. ff. *ad Sen. Trebell.* which says, that when a *fideicommiss* is left under that condition, that it is extinguished if the person therewith burdened leave a son, though that son should afterwards die; so that Sir George his son having survived him, *defecit conditio*, and the *fideicommiss* being once extinguished, by no rule in law could it revive.

Answered for Pitcur; That the words of the declaration are to be taken together, viz. X. 'I procured from Sir George a bond in favour of my friends,' which, joined with the subsequent words, 'that the said bond was to subsist,' &c. make up the two cases, viz. either that the marriage dissolved without children, or that the children died without issue; for so clauses of this nature have been in our law frequently interpreted; particularly No 9. p. 2948., where the words of the interlocutor are, 'THE LORDS found, that the survivancy, and not the existence, of children procreate of the marriage was understood; and therefore found the sum in question to return, seeing the children procreate died without issue before their mother.' And it was *alleged* Pitcur was in a much stronger case; seeing, by the declaration, it appeared, that Sir George his intent was to prefer the issue of his own body, by his wife, to her relations; but, upon that failure, to prefer his wife's friends for the sums in the bond to his other heirs. *2do*, That there is a difference between the condition (*si sine liberis*); and that of (*failing children*); this last being of the nature of a substitution which takes place at any time whenever the institutes fail.

Replied for the executors; That though (*which failing*) do indeed import so much in substitutions, and cannot there be otherwise explained, yet when such words are insert as the condition of a bond, there they must still be understood, so as if the granter should have children surviving him the bond took no place. Nor can it be otherwise understood in the present case without manifest absurdities; for so, if Sir George's descendents had failed after 500 years, this bond, with its whole annualrents, would have been a burden upon his heirs.

THE LORDS found, that supposing the clause in the lady's declaration, (viz. that the bond was to subsist failing children of her body with Sir George) had been insert in the bond, yet the bond could not be binding in the event which hath happened, by the existing of children in the marriage, who survived Sir George, but died before the Lady without issue.

For Pitcur, *Lord Advocate.*

Alt. Ro. Dundas.

Clerk, Mackenzie.

Fol. Dic. v. 1. p. 189. Bruce, No 68. p. 82.

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1740. June 11.

CAPTAIN ALEXANDER NAPIER, and MARIANA JOHNSTON his Spouse *against*
ANNA JOHNSTON.

CAPTAIN JOHNSTON of Kelton made an entail of his estate of Kelton, in favours of Robert Johnston his only son, and the heirs of his body; which failing, to Anna Johnston, his eldest daughter, and the other heirs therein mentioned; but the entail declared Robert free of all the resolute and irritant clauses to which the other substitutes were liable; likeas the Captain granted a bond of provision to Mariana Johnston, his youngest daughter, for 8000 merks. Upon the Captain's decease Robert ratified the above bond of provision in favour of his sister, and likewise gave her 7000 merks more, payable at the first term, year and day after his decease, and which he therein declared revocable at pleasure, and void, in case of heirs of his body. To this additional provision the following proviso was added, viz. 'That in case the said Mariana Johnston shall decease without any child or children, lawfully procreate of her body, and existing at the time of her decease, in that case the said principal sum of 7000 merks, &c. resting at the time of her decease, shall return and fall due and payable to the said Robert, and his heirs representing him in the lands of Kelton; with and under which burden these presents are granted and accepted by the said Mariana, and no otherways.' Mariana Johnston having, in her contract of marriage with Captain Napier, assigned this 7000 merks to him, they brought a process for payment thereof against Anna Johnston the eldest sister.

Pleaded; That no decret could go against the defender unless security were granted, that, in the event of the condition that all the pursuer's children should die before herself, the same should become due and payable to the de-

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A brother made a provision to his sister, under the condition, that it should return to his heirs, if she should die without leaving children. She assigned this provision to her husband, who pursued for payment. *Pleaded* for the brother's heirs; Caution must be found to repeat, in case the condition take effect. *Answered*; A clause of return excludes only gratuitous deeds. Caution was found necessary.

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fender, who was heir to her brother in the lands and estate of Kelton. In support whereof, it was *observed*, That this was not a substitution of whatever kind, which may be disappointed for certain onerous deeds of the institute, unless it is clogged by prohibitory clauses; but that it is a condition imposed upon the right, which can be no more voided by onerous deeds than by gratuitous ones. The condition must have its effect, and suspend or resolve the right, according to the existence or non-existence of it. The very manner in which this provision is conceived, demonstrates it to be a condition. It is provided, that in case Mariana, the creditrix and donatar, shall decease without children existing at the time, the sums shall become due and payable to Robert Johnston of Kelton, his heirs in the lands of Kelton. From which it was plain, that the sum, if paid, must be repeated in the above event; and consequently the bond is granted, and the sum made payable, upon condition that the same shall be repeated upon the existence of the foresaid uncertain event. Further, it is not a return of the sums to Kelton himself and his heirs, but it is an obligation, whereby the sums shall become due and payable to Robert's heirs in that estate by Mariana, in case she received the same.

Again, by the latter part of the clause, it is expressly declared, that the bond was granted by Kelton, and accepted by his sister, under the burden of the above condition; so that this was plainly a gift *sub modo*, subject to the condition therein ingrossed. And as this was altogether a gratuitous grant, it can only be effectual on the terms it was given; neither can Mariana's assigning thereof to her husband void the condition, as that is a quality which must accompany the right; and that the condition refers to the existence of children lawful of her body, the time of her death, which therefore supposes, that it behoved to take place after her marriage.

Answered for the pursuers; That such clause of return or substitution of the granter himself and his heirs, has never been understood to operate further than to exclude voluntary or purely gratuitous deeds in prejudice thereof; and it has always been held, that such return might be defeated by assignations for onerous causes. See 28th February 1683*; January 1679, Drummond†; 10th February 1685, Mortimer‡. More particularly, there was no reason to insist upon caution for repayment in case Mrs Napier's children should predecease her; because, by the bond, the money is payable at the first term after year and day from the granter's death, which is long since elapsed; and it is not denied that the money is now exigible, and the import of the condition is plainly no more, than that the same might afford an exception or defence to the granter's heirs against the executors of his sister; so that the granter or his heirs could not be compelled to pay what should be resting at the death of Mariana: But if she should live till after the term of payment, and should uplift the same, there are no words in this clause providing that the heir of her brother might have recourse against her representatives, by way of action, for repetition of the like

* Strachan against Barclay. † Drummond against Drummond. ‡ College of Edinburgh against Mortimer.—These three cases will be found, *vox Fidei*, Absolute, Limited.

sum. But the pursuer, Captain Napier, who has right to this bond as an onerous assignee in his marriage articles, insists, that the clause can have no effect whatever against him; more especially, considering the tenor thereof, as it concerns only such part of the money as should be resting at the death of Mariana; and that therefore he is entitled to a decret for the sums libelled, without any quality or reservation whatever.

THE LORDS found, that the clause of return of the 7000 merks, contained in Robert Johnston of Kelton his additional bond of provision, was effectual, in case the condition expressed in the clause of return should exist, notwithstanding of the assignation in the contract of marriage between Captain Alexander Napier and Mariana Johnston the pursuers; and that the said pursuers, upon payment of the said sum, must find caution to repeat the same in the event of the existence of the condition mentioned in the said clause of return.

Fal. Dic. v. 3. p. 157. C. Home, No 150. p. 255.

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1761. June 19,

THOMAS and AGNES SOMERVILLES against JOHN SCOT of Whitehaugh.

IN the 1666, by contract of marriage entered into betwixt Walter Scot, father to Isabel Scot, with consent of Walter Scot of St Leonard's his uncle, and Bessy Scot, daughter of William Scot of Horseleyhill, the lands of Westerhead, Whitehaugh, and others therein mentioned, are conveyed by Walter Scot of St Leonard's to Walter Scot his nephew, and the heirs-male to be procreate betwixt him and his said spouse; whom failing, to the said Walter Scot his nearest heirs-male and assignees whatsoever.

This contract has the following clause: ' And because the foresaid lands are tailzied and provided to the heirs-male of the said Walter Scot the younger; so that, by the aforesaid provision and tailzie, the daughters and bairns-female to be procreated between him and the said Bessy Scot, failing heirs-male, as said is, will be altogether debarred and secluded from succeeding to their said father in said lands; therefore, it is conditioned and agreed on betwixt the said parties, that, in case it shall happen that there be no heirs-male procreated betwixt the said Walter Scot younger and the said Bessy Scot, in their said marriage, but only daughters or female children; or being sons or male children, if they shall happen to depart this mortal life before the daughters and female children (if any shall happen to be) ane or mae of the aforesaid marriage, shall be provided and married; in that case, the said Walter Scot, the younger, binds and obliges him, and his heirs-male and of tailzie, and other heirs and successors whatsoever succeeding to him in his said lands, to make good and thankful payment, to the said daughters and female children, of the sums of money under-written, in manner, and at the terms *respective* after

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A clause in a contract of marriage, settling provisions on daughters in case of no sons of the marriage, or in case the sons should die before the daughters were provided and married, found only to take effect in the event of there being no heir-male of the marriage, who should take the estate in virtue of the contract of marriage.

No 18. ' specified, viz. if there be but one daughter, to her the sum of 6000 merks money foresaid; and if there be but two daughters, to the eldest the sum of 5000 merks, and to the second daughter the sum of 3000 merks money foresaid; and if there be three or more daughters, to the eldest the sum of 5000 merks money, and to the rest of the children, equally amongst them, the sum of 5000 merks money foresaid, and that at the first term of Whitsunday or Martinmas next, and immediately following, the said daughters, ane or mae, and ilk ane of them, their ages *respective* of 16 years complete; together with the sum of 100 merks money foresaid of liquidate expenses, in case of failzie, for ilk 1000 merks money foresaid, &c.; together also with the due and ordinary annual rent of profit of said sums, conform to the acts of Parliament, laws, and daily practice of this realm for the time, and that yearly, termly, quarterly, and proportionally, during the not payment of the same sums *respective*, after the foresaid terms of payment thereof; but prejudice always to the execution of thir presents for payment-making to the said daughters, ane or mae, and ilk ane of them, of their provisions *respective* foresaid, at the several terms of payment of the same above-written, or at any other term or time thereafter, &c.; and sicklike, the said Walter Scot, younger, by thir presents, binds and obliges him and his foresaids, honestly and carefully to educate, sustain, and entertain, the said daughters, and ilk ane of them, in all things requisite and necessary, conform to their degrees and quality, until the several terms of payment foresaid; and which sums of money, particularly above-written, so to be paid to the said daughters, ane or mae, in manner foresaid, is hereby expressly provided, conditioned, and declared, shall be in full contentation and satisfaction to the said daughters, and ilk ane of them, of all bairns part of gear, portion-natural, executry, lands, heritages, teinds, sums of money, tacks, or others whatsoever, which always may befall, pertain, or belong to the aforesaid daughters, or any of them, by or through the decease of the said Walter Scot, younger, their father.'

This marriage dissolved by the predecease of Walter Scot, the husband, leaving issue three sons, William, Robert, and John, and two daughters, May and Isabel, who all survived their father.

William the eldest son succeeded to the estate of Whitehaugh, was infest therein, and died without issue in the year 1750, after having buried both his brothers, who also left no issue. William had executed a tailzie, by which he had settled his estate upon his heirs-male; but provided the liferent thereof to his two sisters May and Isabel, or the survivor of them. Isabel being the only surviving sister, entered to the possession of her liferent in the year 1750; and, in the year 1753, when she was betwixt 70 and 80 years of age, she married Mr William Somerville minister at Hawick, and settled all that she had, or should at any time thereafter acquire, failing issue of that marriage, absolutely and irrevocably upon Mr Somerville's children of a former marriage.

In virtue of that settlement, Thomas and Agnes Somervilles the pursuers, as assignees by the deceased Mrs Isobel Scot their step-mother, brought an action against John Scot of Whitehaugh, as representing the father of Isobel Scot, for payment of the provision of 6000 merks settled upon her by her father's contract of marriage.

In this cause several points were moved, which received no decision : And the point determined by the Lords was, Whether by the intendment of the contract of marriage betwixt Isabel Scot's father and mother, the provisions to the daughters of the marriage were limited to take place only in the event of there being no heir-male of the marriage who should take the estate in virtue of the contract ; or, if they were also to take place upon the failure of the heir-male at any time when the daughters were alive and unmarried.

Pleaded for the pursuers : The words in the clause of the contract are very express, and the condition is twofold ; *1mo*, In case there were no heirs-male of the said marriage ; and *2do*, In case there were sons, and that they should happen to die before the daughters should be provided and married. If the first branch of the condition had only been expressed, the provisions to the daughters would have taken place, in case there had been no son of the marriage who survived the father ; for this condition is always understood to exist, notwithstanding that sons are born of the marriage, if they die before the father, or before they succeed to the estate : And as this is the undoubted construction of the first branch of the clause, so the second branch must mean something further, otherwise it is altogether useless and insignificant. But this does not appear to be the case, nor do the words seem to admit of any ambiguity. For, as the first branch of the clause would have given provisions to the daughters, if no son of the marriage had succeeded as heir to his father ; so the second extends to the further event of the heir's deceasing at any time before the daughters, one or more, were provided and married.

It has not been doubted, That when provisions are stipulated in contracts to daughters, ' in case of no heirs-male procreate of the marriage, or in case they ' shall all fail without attaining to majority,' a son survives and serves heir to his father, and soon after dies in infancy, that the provisions would be due to the daughters : But there is no difference in the conception of that clause and the one at present before the Court, but only as to the period of time fixed for the failure of the heir-male ; there, if before his own majority ; here, if before his sister's marriage : If, in that case, his taking the estate by service, could not operate a defeasance of the second branch of the condition, which prolongs the obligation in favour of the daughters down to his majority ; so such service can as little evacuate the very same condition which prolongs it in their favour in this case down to the period of their marriage.

Pleaded for the defender ; That though, in the construction of law, the first branch of the foresaid condition might have been understood to respect the period of the father's death, according as there should be heirs-male of the mar-

No 18.

riage then existing or not; yet it would not thence follow, that, because the parties to that marriage-contract judged it reasonable to add an explanation, viz; that the once existence of issue-male of that marriage should not evacuate the portions to the daughters, in case these sons happened afterwards to die; that therefore this was intended so far to alter the purpose of the original provision to the daughters, that, supposing a son of the marriage to take and enjoy the estate for any length of time, the provision to daughters should, during that whole period, be under suspense, and depend upon the uncertain event of the after failure of sons of that marriage. And when the other clauses of this contract of marriage are taken into consideration, it appears very clearly, that the fair and equitable construction of this clause is such as the defender maintains, viz. That the provisions to the daughters were limited to take place only in the event of there being no heir-male of the marriage who should take the estate at the time of the father's death. For,

1mo, The professed motive of establishing this provision to the daughters of the marriage, was their being debarred and excluded from their natural right of succession to their father's estate. But this expression does not apply to the succession of a son, the brother of these daughters. Daughters are not secluded from their father's succession, when their brother takes it; which plainly demonstrates, that it was the state and condition of the family at the time of the father's death, which was alone meant and intended by the father's contract of marriage.

2do, These portions are declared to be in full contentation and satisfaction to them of all bairns part of gear, &c. which any ways may fall, pertain, or belong to them by or through the decease of the said Walter Scot, younger, their father; still alluding to the father's death, when the daughters were by law entitled to their bairns part of gear, &c. out of their father's means as they then stood. But it cannot be seriously maintained, that, had the daughters, at their father's death, brought an action against their brother for payment of their bairns part of gear, or portion-natural, the portions ascertained to the daughters, to take effect upon the uncertain and remote contingency of the failure of all their brothers without issue, could have been obtruded to them in bar of their claim; and yet this would follow as a necessary consequence from the pursuer's plea.

3tio, The father is taken bound to educate and aliment the daughters until the terms of payment of their foresaid provisions. But it surpasses all comprehension to suppose, that it could be intended to lay the father and his heirs under an obligation of alimenting and entertaining these daughters to the remotest period, until their portions should become payable, upon the uncertain event of the failure of all their brothers without issue. These are absurdities which are all avoided by the construction of the clause maintained by the defender, but which are unavoidable consequences of the plea maintained by the pursuers; and which therefore demonstrates, that the meaning which they want

to put upon this clause is without any foundation, and could not be the intention of the contracting parties.

No 18.

THE LORDS, on the 25th February 1761, 'found, that, according to the indentment of the contract of marriage betwixt Walter Scot and Bessy Scot, in the year 1666, the provisions to the daughters of the marriage, though inaccurately expressed, were only to take effect in the event of there being no heir-male of the marriage who should take the estate in virtue of the contract of marriage; and, as there was an heir-male of the marriage who succeeded to the estate, and lived to the year 1750, found the provisions to the daughters never became due; and therefore assoilzied, and decerned.

Upon a reclaiming petition and answers, 'the LORDS adhered.'

Act. *Ferguson.*Alt. *Lockhart.*

J. M.

Fol. Dic. v. 3. p. 157. Fac. Col. No 39. p. 78.

1793. December 10.

OLIPHANT against OLIPHANT.

No 19.

AN heir under an entail, which contained a reserved faculty, of providing younger children to a certain extent, having exercised that faculty to its full extent, by granting a bond of provision in favour of two daughters, then his only younger children; afterwards married again, and died without making any alteration on the bond of provision. A posthumous child being born of this second marriage, the LORDS found the child entitled to her share of the bond of provision.

Fol. Dic. v. 3. p. 158. Fac. Col. No 63. p. 138.

* * * See The particulars, *voce* IMPLIED WILL.

SECT. II.

Condition of Marrying with Consent.

1578. December 12. CULLERNIE against LAIRD of ST MONANCE.

THE LAIRD of Cullernie pursued the L. of St Monance in name of his sisters, upon his obligation for the soume of L. 500, in the whilk obligation S. was obliged and bound to give the said soume to Cullernie's sisters, with this provi-

No 20.
A person having given a bond to a wo-

No 20.
man for a sum
of money, she
marrying
with his con-
sent, the
Lords decern-
ed him to pay
the money,
though she
married with-
out it.

sion, that they sould marry, with the advice of Mr Peter Sandilands, or failing of him, be the advice of the said Laird of S. It was *answered*, That the said sisters could not acclain be this obligation, because they had married themselves by the advice of the said Mr Peter and the said Laird, expressly against the tenor of the said obligation. To this was *answered*, *quod de jure, matrimonia debent esse libera*, and that there was no bond or obligation that could hinder or restrain the liberty of marriage to them. To this was *answered*, That the clause of the obligation was not to stop the liberty of marriage, but rather to further the same; that was, the young gentlewomen should use the counsel and advice of their friends and parents in their marriage. THE LORDS, notwithstanding, decerned S. to fulfil the contents of the obligation; and that the same was nothing against the liberty of marriage.

Fol. Dic. v. I. p. 189. Colvil, MS. p. 267.

1617. July 16.

KENNOWAY against CAMPBELL.

No 21.

IN a suspension raised by Mr Patrick Kennoway *contra* Campbell, his wife's sister's daughter, to whom he had promised 500 merks if she married by his advice, the LORDS found the letters orderly proceeded, notwithstanding it was *alleged*, that the promise was conditional, if she married with his consent.

The contrary hereof decided 16th December 1629, betwixt Hume and Hume, (*infra*).

Fol. Dic. v. I. p. 189. Kerse, MS. fol. 47.

1629. December 16.

HUME against HER TENANTS.

No 22.

A tack was granted, to be void if the tenant's daughter married without the landlord's consent. Found, that this consent must be express in order to validate the tack; and silence at the marriage; and future good correspondence were not sufficient to infer consent.

AGAINST a removing the defenders *alleging* a tack set by the pursuer's husband and herself; and the pursuer *replying*, that it bore a condition, 'That if the defender's daughter married without her husband's consent, the tack should be null;' this reply was received *hoc ordine* without declarator, which was not found necessary to precede, as the defender alleged; neither was it found necessary that the pursuer should qualify, that he disassented from the marriage of the daughter to her husband, with whom she was married; but to purge the condition, and for maintaining of the tack, the defender was holden to prove that he gave his consent, which if he could not qualify, the tack could not subsist, being set with that provision; and it was not sustained as sufficient, that the person whose consent was required was now dead, and that he lived many years after the marriage, and never exprest his dislike and dissent; and their bands were publicly proclaimed, and not opposed by him, and that after the marriage, he contracted with them in sandry bargains, which all the de-

fenders *alleged*, ought now to be found as good as an express consent, after intervening of 25 years and more, and that long possession by the tack since, during which space it was never quarrelled by the husband of this pursuer, which allegiance was repelled, and the express consent required.

No 22.

Act. Craig.

Alt. Belshes.

Clerk, Gibson.

Fol. Dic. v. 1. p. 189. Durie, p. 474.

1663. January 8.

GORDON against The LAIRD of LEYES.

SIR THOMAS BURNET of Leyes (now deceased) gives a bond of 9000 merks to Margaret Burnet his daughter; of which bond, she and John Gordon of Brachlie her spouse, pursue exhibition and delivery against this Laird of Leyes, and Mr Robert Burnet advocate haver. It was *alleged*, That the bond is conditional, that she should marry with consent of the Laird of Leyes for the time; but so it is that she married without consent of Leyes, or any of her father's friends; 2. That by an agreement after the marriage in writ, her husband and Leyes condescended upon a lesser sum in satisfaction of the said bond, and so the bond is innovate and taken away. It was *answered* to the first, That *matrimonia sunt libera*, and such conditions should be holden *pro non adjectis*, as has been often found; and that the first bond is acknowledged by the second agreement. And as to the said agreement, and allegiance founded thereupon, it was *answered*, it was conditional, if the sum condescended on were punctually paid at Whitsunday 1661, the former bond should stand in force. It was *replied*, That the condition resolved only in a failzie, which the defender might yet purge, considering especially the time and scarcity of money, and that the said Margaret had so far miscarried against her friends; and the bond was never a delivered evident, but put in her uncle's hand to be furthcoming to her, if she should carry a-right.

No 23.
Marriage being free, the Lords refused to sustain conditions and limitations regarding it, adjoined to bonds of provision to daughters.

THE LORDS found the second allegiance, or reply relevant, and that the defender might yet purge. See IRRITANCY.

Fol. Dic. v. 1. p. 189. Gilmour, No 60. p. 43.

1672. February 22.

FOWLIS against GILMOURS.

IN a declarator pursued at the instance of Dame Margaret Fowlis, relict of Sir Andrew Gilmour, against Alexander Gilmour, eldest son to Sir John Gilmour late Lord President of the Session, and Annes Gilmour, his sister, upon this ground, That Sir Andrew having disposed, in favours of Margaret Gilmour his only daughter, his whole estate, which he then had, or should acquire, with this provision, that in case his daughter or her children should decease be-

No 24.
A wife being substituted by a husband to a provision left to a child, in case of the child's death,

No 24.
upon condi-
tion *si vidua*
manerit et non
nupserit, the
Lords found
the condition
lawful.

fore her mother, the said estate should belong to her mother, she remaining unmarried; as likewise by a testament of that same date, he appoints his daughter his universal legatar, and failing of her by decease, her mother to succeed upon the same terms; whereupon it was craved to be declared, that the said Dame Margaret only had right to the bonds or sums of money that belonged to Sir Andrew, his daughter being now dead, and he having no other children. It was *alleged* by the defenders, That the disposition and testament being qualified, as said is, she could thereby have no right, but, in case she should die unmarried again; and if she should uplift the sums of money belonging to her husband, she ought to be decerned to re-employ the same with that same quality and condition; so that if hereafter she should marry, they ought to belong to the nearest of kin of her husband. It was *replied*, That such conditions being reprobate by the law, whereby *matrimonia debent esse libera*; and it being the meaning of the defunct, that the said restraint of not marrying should only be in force during the lifetime of his daughter or children; she being now dead, and there being no children of the marriage, that condition and the restraint is void, specially seeing the mother's substitution to the children is burdened with the provision of 500 merks to be paid to Sir Andrew's natural daughter; which certainly he had never done, if he had not intended that his Lady should have right failing of his children, seeing that provision was payable at her marriage whensoever it should happen.

THE LORDS albeit they found, that the condition *si vidua manerit et non nupserit* be consonant to law and not reprobate, yet they decerned that the relict should have right to the whole estate, by virtue of that substitution, notwithstanding of the qualification; and, that it was the meaning of the defunct that it be so, not only because that it was burdened with a paction to his natural daughter, but likewise because, by a former bond when he had no lawful children, he had provided his Lady to his whole estate.

Fol. Dic. v. 1. p. 191. Gosford, MS. No 485. p. 254.

1673. January 17.

RAE against GLASS.

No 25.
One having
granted a
bond to his
niece, under
condition,
that she
should marry
with his con-
sent; the
clause was
strictly inter-
preted, and
it was found
that his

JAMES RAE having assigned to Alexander Glass several sums of money, about L. 10,000 principal, and many annualrents, he pursues the said Alexander Glass, *alleging* the assignation was in trust to his own behoof, and that Alexander promised to compt for what he should recover; and the said Alexander having *alleged* that he was obliged for no account, and having been appointed to give his oath what was the true cause of the assignation, and having begun to depone, being prest with several interrogatories, he took up the same, and offered a qualified oath in writ; whereupon the LORDS, before they determined anent the oath, ordained an accompt to proceed what the sums were that were

assigned and recovered, and what sums were due to Glass ; in which account Glass gave in an article of 7000 merks, upon this ground, that the pursuer gave a bond for that sum to his niece, whereunto the defender hath now right *jure mariti*. It was answered, *imo*, That this bond was granted when the pursuer was a soldier at Newcastle, under his brother Colonel Rae ; at which time he granted another bond to another daughter of the Colonel's of the like sum, which did nearly equal the principal sum of his stock, and must be understood to be done *mortis causa*, seeing he reserved not the annualrent, or any aliment to himself, and so is revocable ; which is the more evident, that in the defender's contract of marriage with the pursuer's niece, there is no mention of this bond, not so much as to oblige the husband to employ it for the wife's liferent, and the bairns of the marriage. *2do*, The bond itself is conditional, ' providing ' she marry with the pursuer's consent ; ' *ita est*, she neither required nor got his consent. The defender replied to the *first*, That donations *mortis causa*, are never understood, but when there is express mention of eminent death ; and the neglecting of this bond in the contract of marriage, can be no ground to annul it, being done because at that time there was little hope of recovery of the debts, and the defender hath only recovered a part from the Earl of Loudon with great difficulty, advance, and expense. And as to the *second* defence, the condition is purified, in so far as the pursuer is a witness in the contract of marriage, which must necessarily import that his niece married with his consent ; and albeit he had given no consent, such clauses can import no more than a power to give a rational dissent ; for, seeing *matrimonia debent esse libera*, it must not be every dissent that will hinder, but that which is founded on a good reason, and there was no pretence to have dissented from this marriage. It was replied for the pursuer, That the subscribing as a witness doth import no more, but that the witness saw the party subscribe, and not that he read, much less considered the contents of the writ ; and though the pursuer had known the contents, yet finding no mention of his bond in the contract, he could never think that it was a consent to purge the quality of his bond, which could not be a presumptive or consequential consent, but an express consent for purging the condition in his bond ; for after so long a time he might have forgot there was such a bond ; and albeit those who have a natural obligation to provide, giving bonds for tochers upon condition of marrying with their consent, if they do irrationally dissent, their natural obligation and the favour of marriage will take off their dissent ; but where a person that is not naturally obliged to provide, gives a bond upon the condition of consent, his consent is *meri arbitrii*, and he needs render no reason for it but his particular affection, or disaffection to the husband ; and in this case his consent was not so much as required : And that presumptive consents are not sufficient where express consents is required, is evident in many cases ; as if a superior should subscribe witness to a writ, dis-

No 25.
 scribing witness to her contract of marriage did not import such a consent.

No 25.

poning ward lands, his subscribing witness could not import such a consent, as did ratify the deed, and take away recognition.

THE LORDS found that the pursuer subscribing as witness to the contract of marriage, or being present at the communing, or marriage, did not import that consent that is required in the condition of his bond, unless it had been specially treated concerning his bond, he being present and knowing the same; and that his presence at the marriage, or living with the married persons thereafter, did not import that consent: but they did not find that the bond was a donation *mortis causa*, and so revocable.

Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 151.

1680. February 13.

BUCHANAN against The Laird of BUCHANNAN.

No 26.

A daughter being competently provided, her father gave her an additional provision which was to become void, if she married without his consent. The Lords found the irritancy incurred, she having married without his consent, tho' it was a suitable match.

THE Laird of Buchanan in his contract of marriage, provides his estate to the heirs-male of the marriage, and to the daughter of the marriage, in case there should be but one, 10,000 pounds; but thereafter he gave her a bond of 20,000 merks, and she gives a bond that she should not marry without her father's consent, and if she did in the contrary, that she should lose any addition made to her portion-natural. Buchanan having no heirs-male, disposes his estate to Major Grant, he assuming his name, and providing that he marry the said Elizabeth his daughter, and in case of her refusal, he burdens the estate only with the provision in her mother's contract, and declares the same to be free of the 5000 merks he had added to her by his bond. Major Grant came to the said Elizabeth with a notary, and offered to marry her, and desired that she should consent, which she refusing, he took instruments thereon. The said Elizabeth hath now married Stuart of Ardvorlich, and with his concurrence pursues adjudication upon her father's bond. The defender *alleged* absolvitor from the 5000 merks of addition, because the pursuer had not married with her father's consent, but contrary to his express will; so that the addition being a gratuitous donation, it is not only revocable for her ingratitude in marrying without her father's consent, but by express provision, both by the bond itself, and by the back-bond. The pursuer *answered, 1mo*, That such clauses are contrary to the freedom of marriage, and therefore are holden *pro non adjectis*. *2do*, She ought not to have desired her father's consent to this marriage, knowing that he was pre-determined to assent to no marriage but to George Grant's; and it would be no ingratitude to refuse to marry George Grant, being a man so far above her age, and who shewed no affection for her, but rather to be rid of this addition, by an uncivil putting her to an acceptance of the marriage on the first proposition; neither was her father in a capacity to assent to this marriage, in respect of his disposition to Grant. *3tio*, Such clauses do import no more but to guard against unsuitable marriages, and this marriage is most suitable, for if she had desired her father's consent, and he had been at freedom to give it, it

would not have annulled her portion, unless he gave a reasonable cause of his refusal. The defender *replied*, That clauses adjected, in case parties marry not, are holden as not adjected, being impeditive of marriage, which should be free ; but free donations granted on condition, ' That the party marry such a man, or marry not, without the donor's consent,' are no ways rejected ; much less in the case of a father and daughter. *2do*, The daughter should have craved her father's consent, both by her natural obligation, and her back-bond, nor was he bound up by his disposition to Grant ; for, if she had proposed a reasonable cause why she should not marry Grant, if it had been no more but that she could not find affection for him, it might have excused her, if she was ready to depone that it was true ; but she is inexcusable never to have demanded her father's consent ; neither was he bound up, but if he had been convinced of the reasonableness of her refusal, in not marrying Grant, and marrying Ardvorlich, he might have consented, and so purified the condition in her bond, which being before Grant's disposition, could never be prejudged by any clause in it.

THE LORDS found the liberty of the marriage did not exclude the provision in the back-bond, and found that the father might have assented to her marriage with Ardvorlich, and so made the bond effectual, albeit after the bond he had insert an irritancy in Grant's disposition, and therefore adjudged only for the 10,000 pounds.

Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 756.

1680. December 3: The Laird of FETTERNEER against The Lord SEMPLE.

No 27.

The condition in a bond of provision to daughters, that they should proceed in all their affairs by advice of certain friends, found to be valid and effectual.

THE deceased Lord Semple granted a bond of provision to his daughters, specifying their particular portions, and bearing this clause, ' That they should proceed in all their affairs by advice of his friends therein mentioned, and in case they did transgress, or did not carry themselves virtuously, the bond as to these should be null, at least his friends, or the major part of them on life, should have power to restrict, and to apply the restriction to such other of the daughters as they thought fit.' The portion of his eldest daughter Mistress Anna, is 10,000 merks by a former bond of provision, ' having only power to himself to alter,' and she having married the Laird of Fetterneer, he pursues for her portion. The defender *alleged*, That she married without his friends consent, and that therefore they had restricted her portion to 6000 merks, suitable to the quality and fortune of this husband, and bearing this consideration, ' That his fortune was but small, and lying far from her friends in Aberdeenshire.' The pursuer *answered*, That all clauses against the freedom of marriage are null. *2do*, That Mistress Anna could not be said to transgress, unless the second bond had been intimate to her, or known by her. *3tio*, Though it had, and though she had required their consent, and they had refused it ;

No 27. yet such clauses could take no effect, unless they could instruct a just cause of the refusal, much more when they were past by.

THE LORDS found the clause of the bond was just and valid ; but it could not be understood to be transgressed, unless it had been known to the Lady before her contract of marriage, and in that case, ordained her friends to declare their relevant reasons of denying their consent, and to instruct the same.

Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 812.

1681. February 13.

HAMILTON against HAMILTON.

No 28.

MARRIAGE being free, marrying without a father's consent, was found not to annul a bond of provision, by a father to his eldest daughter. The bond contained this clause, ' she marrying with his consent, and of those named by him as her curators, ' otherwise she should only have the sum of blank,' which was never filled up. The LORDS found they might fill it up, if she had transgressed the clause, and thereby restrict the provision according to the match she made ; but this nomination not being shown or known to her, the irritancy was found not incurred.

Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 865.

. See The particulars, No 3. p. 672.

1682. March.

FOORD against FOORD.

No 29.

A party granted a disposition to his niece with this proviso, that she should not marry without consent of certain persons. The convention found relevant to annul ; but the defence admitted, that she had required this consent, and it had been refused without a cause assigned.

WILLIAM PETRE in Wester Saltoun, having granted disposition of his moveables to Allison Pooll, his niece, with this provision, That she should marry with the advice and consent of William Foord and John Calderwood in Saltoun, and in case she should not follow their advice, and marry otherways, the disposition is declared to be null and void ; in that case, disposes his moveables to the said Allison and to her brother, and to Elizabeth, another sister, equally amongst them. And the said Allison having married without consent of the persons appointed by the father, her brother and sister raise a declarator against her, for declaring the disposition to be null, and that two parts of the moveables did belong to them. *Alleged* for the defender, That such provisions are unlawful, as being *contra libertatem matrimonii*, and can be no farther sustained but to oblige the person who is burdened therewith to enter into a rational marriage ; and her husband being a suitable match, the persons appointed by the father cannot condescend upon any rational ground of their dissent. *Answered*, That such provisions are just and rational ; and as it was in the uncle's power to have disposed his moveables to her or not as he pleased, and therefore she having contravened the provision of the disposition, she ought justly to lose the benefit thereof, which has been many times decided in the like case,

and particularly is decided 1669, the Lady Hume against her Tenants, No 22. p. 2964., where the LORDS found that knowledge and silence, and no dissent expressed for the space of 25 years was not sufficient, unless positive consent had been obtained and proven; and 17th January 1673, Rae against Glass, No 25. p. 2966., where the LORDS found that there was no necessity for the parties to condescend upon the reasons of their dissents; and the 13th February 1680, the Laird of Buchannan against Elizabeth Buchannan, No 26. p. 2968., where, albeit it was offered to be proven that Buchannan was not *sane mentis*, and had declared that he would consent to no other marriage with his daughter but George Grant; yet, the LORDS found a bond of provision, bearing, that quality was null, in respect his daughter had married without his consent, albeit the person she [matched with, was a suitable match. THE LORDS found it relevant to annul the disposition, the provision in the disposition that she should not marry without consent of the person therein mentioned, to be proven by her oath; and if she acknowledge the same, found the answer relevant, that she required the persons by whose advice she was appointed to marry to give their consent, and that they refused to give a reason why they would not consent to the marriage.

No 29.

Fol. Dic. v. 1. p. 189. Sir Pat. Home, v. 1. No 186.

1687. June 9.

CAPTAIN JOHN DALZIEL and CHRISTIAN ELIES *against* SCOTSTARBET, &c.

CAPTAIN JOHN DALZIEL and Christian Elies his spouse, having obtained a deliverance last Session to cause Scotstarbet, Livingston and me, to answer summarily to a declarator raised by them against us, to consent to their marriage, and to her disposition of her portion to him by her contract of marriage; or else that the Lords would declare her disposition valid without our consent; notwithstanding that, by her father's disposition, she is restricted to adhibit our consent;—THE LORDS, on a bill, retracted that deliverance, and ordained the process to be given out to see *in communi forma*; though he was a Captain in Holland, and his forelooff expired; because, whatever the Lords might appoint against me, as a member of the session, (and yet this is not *in actu officii*.) yet they could not deny the rest the usual *induciæ deliberatoriæ* of seeing in common form *et via ordinaria*.

No 30.
Found, that a lady had right to her tocher, although she had not obtained the consent of certain persons named by her father.

July 6. 1688.—The declarator pursued by Captain John Dalziel and Christian Elies, his spouse, against Scotstarbet, &c. mentioned 9th June 1687, being advised; the LORDS find that she has right to the tocher, notwithstanding the friends named by the father have not consented to her contract of marriage; and the LORDS supplied their consent; but found she must provide it in the

No 30. terms of her father's tailzie ; so that failing of heirs of her body, and her sister Elizabeth, it goes to the other substitutes ; so that her husband could not break nor alter it. He reclaimed against this, that he might have the power of disposal upon it.

Fol. Dic. v. I. p. 190. Fountainball, v. I. p. 454. 510.

No 31.

Found, that a brother not giving consent to his sister's marriage, which consent, by her father's appointment, she was bound to obtain, under an irritancy of losing part of her portion, did not infer the irritancy, unless he gave a reason for his dissent.

1688. July 20. PRINGLE and RUTHERFORD against PRINGLE.

ELIZABETH PRINGLE, and Rutherford her husband, pursuing Pringle of Symington, her brother, for her portion, he repeated a reduction upon these grounds ; *1mo*, That some of the bonds assigned to her were heritable, and the assignation by her father was *in lecto*, at which time he could not prejudge his heir ; *2do*, That she was obliged to marry with his consent, else 2000 merks was to return to him.—*Answered* to the *first*, He was her tutor, and granted discharges of the annuals of these sums *tutorio nomine*, and so had homologated, and could not now quarrel it ; *2do*, He had accepted a disposition from his father, narrating this portion ; *3tio*, As to her marriage, the quality was not known nor intimated to her.—*Replied*, His acting as tutor did not preclude him, as is clear from § 4. *Institut. de inofficios. testament.*—THE LORDS repelled the reason founded upon death-bed, the charger proving that the suspender had accepted a disposition, which narrates the cause and occasion of the same to be the bonds assigned ; and find, that the suspender not giving his consent to the charger, his sister's marriage, does not infer the irritancy contained in the assignation, of applying 2000 merks of the said bonds to the suspender ; unless the suspender could give a reason of dissent ; for they would not allow him, upon the prospect of his own benefit, to deny his consent to every proposition of marriage made to his sister, because he hoped 2000 merks would fall in to him.

Fol. Dic. v. I. p. 190. Fountainball, v. I. p. 512.

No 32.

A lady and her husband pursued for her tocher, contained in a bond of provision having this condition, that she should marry with consent of certain friends, otherwise the bond to be null. The marriage

1710. July 7. WILLIAM BUNTIN against ARCHIBALD BUCHANAN.

WILLIAM BUNTIN, son to the Laird of Airdoch, having married Jean Buchanan, daughter to Drummakill, he pursues Archibald Buchanan of Drummakill, her brother, for payment of 5000 merks contained in a bond of provision given to her by her father.—*Alleged*, She has forfeited her right, because the bond contains an express quality, that his daughter shall marry with the special advice and consent of George Lindsay of Blackshome, and John Cuninghame of Ballindalloch, otherwise her bond to be void and null ; but so it is, she never required their consent ; but, on the contrary, they dissented ; and this tocher being a donation, it may be given with what qualities and conditions the donor pleases ; and if not obeyed, the quality ceases, *tot. tit. C. de donat. sub modo et*

condit.—Answered, That marriage is favourable, especially when with their equal without disparagement, (as this was) and any restrictions and limitations whereupon are commonly rejected as *contra libertatem matrimonii*, and Ballindalloch, (who was only on life of the two nominate,) has since the marriage declared his acquiescence, and that he has nothing to object against it, so that his ratihabition *comparatur mandato*; and such provisions are not pure donations, but are the effects of a pre-existent obligation from the laws and ties of nature; and whatever creditors may say against them, yet they are always good against the granter's heir; and such clauses have been oft repudiate, as *inutiliter adjecta*, and was so found, 3d Dec. 1680, Fetterneer *contra* L. Semple, No 27. p. 2969.; and in 1681, Hamilton of Monktonhall *contra* Baird of Saughtonhall, No 28. p. 2970. where the clause was not intimated to the daughter, nor shown to the daughter; nor shown to her before her marriage, the bond never being in her custody, but in the hands of a friend. Provisions to children are *juris naturalis*, and not to be forfeited upon latent clauses, but only where there is evident contempt and contravention, but here *ignorantia invincibilis* plainly excuses her.—*Replied*, The Lords have not extended these irritant clauses about marriages without consent, to annul the provision *in toto*, but only to restrict them to a moderate and reasonable tocher, corresponding to what would befall them as their legitim and portion natural, and Drummakill pleads it no farther, but that the Lords may consider the condition of the fortune, and the debts affecting the same, and they will find this a most exorbitant provision; and all that is craved is, that it may be reduced *quoad excessum*, and brought to a just equality. And as to her ignorance, it is offered to be proven she knew the terms of her father's bond; and Ballindalloch's consent *ex post facto* is of no import; for he who justly refused his consent before the marriage, when the thing is done without his concurrence, what is the remedy but to make the best of an ill bargain they can?—THE LORDS repelled the defence, and found Drummakill liable in the whole tocher, and refused to modify it. If she had married to a *turpis persona*, or with great disparity, the Lords would have taken it to consideration.

Fol. Dic. v. 1. p. 190. Fountainhall, v. 2. p. 584.

* * Forbes reports the same case :

WILLIAM BUCHANAN of Drummakill having, by his bond, provided 5000 merks to his only daughter Jean, she marrying by advice and consent of George Lindsay of Braxholm, and John Cuninghame of Ballindalloch, or any of them that should be alive at the time, and that the bond should be null in case she married without such consent; William Buntin, husband to Jean Buchanan, as assignee by his contract of marriage, pursued Archibald Buchanan, as representing William his father, for payment of the provision.

No 32.
was without disparagement, yet the nominees dissented. The defender pleaded for a restriction of the tocher to a sum equal to the lady's legitim; but the whole tocher was decreed for.

No 32.

Answered for the defender ; Because marriage is favourable, and our law and custom hath taken some liberty in annulling all restrictions thereof, he doth not quarrel the validity of the bond, *quantenus* it can be thought a reasonable provision, but only *quoad excessum*, in so far as the father, out of his anxious desire of a good marriage to his daughter, hath given her tocher far above what his circumstances and the condition of his fortune could bear ; which being a pure donation, is not to be paid but upon precise performance of the conditions thereto adjected, *L. 4. C. de Donat. quæ sub modo* ; and so it is, that the said Jean Buchanan married the pursuer, without the previous consent of any of the nominees, whereby the irritancy in the bond was incurred.

Replied for the pursuer ; Such clauses irritant are unfavourable and held in law *pro non adjectis*, especially where the child, (as in this case) doth match with her equal in quality and fortune ; and Ballindalloch, the only surviving trustee named by the father, hath judicially declared that he hath nothing to object against the match ; *2do*, The clause cannot militate against the pursuer, unless it had been intimated to his wife before her marriage, Laird of Fetterneer *contra* Lord Semple, No 27. p. 2969. Hamilton and Baird of Saughtonhall, her husband, *contra* Hamiltons, No 28. p. 2970. ; *3tia*, The allegiance that the provision exceeds what the granter's estate could then allow, is frivolous ; for it is expressly contrary to the narrative of the bond, bearing, That it had pleased God to bless him with a fortune, and that it was just and reasonable that his children be competently provided with such moderate provisions as his estate is able to bear ; and the father knew best his own condition.

Duplied for the defender ; Narratives in such kind of writs, being only stile of course framed by writers, do no prove the design of the granter ; and seeing the most that can be inferred from the narrative is a presumption, that must yield to truth : Nor could Ballindalloch's approbation *ex post facto* import that he would concur to the deed if it were yet to be done ; but only that, since what is done cannot be retrieved, he would agree and make the best of what cannot be helped.

THE LORDS repelled the defence, and found, that the clause irritant in the bond, is not relevant to infer a restriction of the sum.

Forbes, p. 418.

1710. July 20.

No 33.

A man granted bond to a young woman, in consideration of a sum assigned to him, and bound himself to pay

WILLIAM ALISON, Merchant in Dundee, *against* JOHN DUNCAN, Merchant there.

JOHN DUNCAN having granted a bond to Helen Straiton, daughter to Robert Straiton apothecary in Dundee, narrating, That Mr Patrick Yeaman indweller there, her uncle, had assigned to him certain sums, under the express provision and condition of his granting the obligation under-written ; and therefore bind-

ing and obliging him to pay to the said Helen Straiton L. 1000 at the next term after her marriage; she always acquainting him therewith, and taking his consent thereto, if alive at the time; Helen Straiton, with consent of her father, but without acquainting John Duncan, married Robert Christie; who with her, assigned to William Alison, John Duncan's bond. Duncan being charged at the instance of the assignee, suspended upon this reason, That the cedent having failed to acquaint the suspender of her marriage, which is the condition in the bond, the obligation is null.

Answered for the charger; Not only is the condition in the bond, as *contra libertatem matrimonii*, to be held *pro non adjecta*; but also it is most odious and *contra bonos mores*; in so far as it tends to make the creditor depend more in the election of a husband upon Mr Duncan, than upon her own father, whom law presumes to have the most tender regard for her welfare and interest; *2do*, There being no quality in Mr Patrick Yeaman's assignation to Mr Duncan, which was the onerous cause of his granting the bond, it was unwarrantable in him to clog his bond with any such quality.

THE LORDS repelled the reason of suspension.

Fol. Dic. v. 1. p. 190. Forbes, p. 425.

1712. January 2.

MACKRATH against ALEXANDER.

JOHN MACKRATH of Mackilston having no children but a bastard-daughter, he marries her to Thomas Alexander, his nearest kinsman; and there being a daughter procreate of that marriage, he, designing to settle his estate on that grandchild, disposes his lands to one John Mackrath and Mary Alexander, his said grandchild, and the heirs-male to be procreate of their body; and then adjoins this clause, 'who, by these presents, are destined and appointed to marry together.' Mackrath dying in 1703, Thomas Alexander, his son-in-law, and heir of line, enters into possession of the lands; and John Mackrath, the boy to whom it was disposed; raises a pursuit against the said Thomas, for half of the mails and duties of the lands for his aliment in the mean time, and educating and maintaining him at schools. *Alleged*, Your disposition is conditional, being to him and Mary Alexander, and the heirs-male of their body, which necessarily implies their marriage, though there had not been an express clause appointing them to marry, (as there is); and therefore you have neither title nor interest to call for the rents till you perform the condition by marrying, being both arrived at the age allowed by law, you being 15 and she about 16. *Answered*, This is no proper condition, neither suspensive nor resolute; not suspensive, for when the old man died they were about six or seven years old; and it cannot be supposed to be his meaning that I was to have no right to the mails and duties till I actually married, seeing that could not be done for the course of sundry years after, bringing us both to a maturity of age for a married

No 33.

her a sum the next term after her marriage, provided he was informed of it, and gave his consent. She married without either, but the bond found due.

No 34.

A person disposed his estate to two relations, with this clause, 'who by these presents are destined and appointed to marry each other.' The male disponent pursued for aliment, &c. the person who had an intermediate right to possess the estate. Found entitled to aliment and education, whatever might be done in future if he refused to marry upon requisition.

No 34.

state; and, therefore, *medio tempore*, I was to be alimanted out of the lands. Neither is it a resolute irritant condition, for there is no period set for performing the marriage, nor any clause adjected, declaring the disposition void and null, in case of not performance; and the truth is, that though she be of a full growth, yet the boy is of a weak tender sickly constitution, scarce the bigness of one of twelve years, and very unfit as yet for marriage; and, though he does not decline it, yet he is persuaded the old man, if alive, would not be so unreasonable as to urge his marrying presently, till he came to a more solid habit of body; and to wait that time can never forfeit my right. And what are you that detain the rents from me? You, though heir of line, can never come in the contrary of his tailzie to me, and your daughter; which will exclude to the end of the world; and you have no pretence to keep up my rents, nor debar me till I be married. *Replied*; The *ordo charitatis* in this disposition was the love and affection he bore to his grandchild, and it is by her you are called to the fee; so, till that be performed, you have no claim, you being no relation at all but the name; or, if any, very remote; and had no expectation but in view of her who was the *persona magis dilecta* by the defunct; and, therefore, the condition of a marriage hanging on a may, and may not be, *dies obligationis nec venit nec cessit*. And this is decided in l. 51. *D. de condit. et demonstrat.* THE LORDS thought, that albeit *matrimonia debent esse libera*, and where *coacta difficiles solent habere exitus*, yet if a right be burdened with that quality and condition, you must either fulfil the terms, or want the donation. So there is no absolute restraint, but only an alternative; and though this condition be like the *sponsalia* preceding marriage, yet there being no requisition as yet used by way of instrument offering the lass to him, nor any direct positive refusal as yet on his part, he cannot be debarred from the rent to educate and maintain him, whatever may be done if he shift after requisition.

Fol. Dic. v. 1. p. 190. Fountainball, v. 2. p. 697.

* * * Forbes reports the same case :

THE deceased John Mackrath of Mackilston having no children but a natural daughter, married to Thomas Alexander, who had by her a daughter called Mary Alexander, did, for love and favour, to John Mackrath and Mary Alexander, then infants, under the conditions after mentioned, dispone his lands to them, who were appointed to marry together, and the heirs-male to be procreated of their bodies; which failing, or being and deceasing, to James Mackrath in Glen his nearest heir-male; which failing, to Mary Alexander, she surviving her own nearest heirs male or female, their heirs and assignees; and for the causes, and under the conditions foresaid, constituted the foresaid persons in manner, and conform to the destination above-written, his assignees to the mails and duties of the land after his decease. John Mackrath, when he was

past fourteen years of age, pursued Thomas Alexander, who, as heir of line served to the disponent, had intromitted with the rents of the lands disposed, to pay to him the half thereof since the disponent's death.

Alleged for the defender; The pursuer hath no interest to call for the rents, the disposition being granted upon a suspensive condition, that he and Mary Alexander marry together; which can take no effect till the condition be fulfilled by their marriage.

Replied for the pursuer; No period of time being assigned for his marrying Mary Alexander, it must be understood in a rational and prudent sense, viz. when he should come to that maturity of age and habit of body which fits him for marriage; and he is most willing to marry her when in a capacity to do it. Now, it is not to be thought, that the disponent intended the mails and duties to remain with his heir until the pursuer were capable to marry; but that Mary Alexander and he should enjoy them *medio tempore* for their aliment and education.

THE LORDS found, that the pursuer had right to the half of the mails and duties of the lands disposed, since the death of the disponent; reserving, to their Lordships consideration, the import of the disposition, in case the pursuer should refuse or decline, when he comes to age, to accept of Mary Alexander for his wife.

Fol. Dic. v. 1. p. 190. Forbes, p. 567.

1750. June 6. & July.

SIR KENNETH M'KENZIE *against* The CREDITORS of Kinminnity.

WHERE a father, who is under a natural obligation to provide his children, qualifies a bond of provision to his daughter, with a condition 'of her marrying with consent of persons therein named,' the tocher will be due although she marry without their consent, without doubt, if the marriage be suitable: What the LORDS might do in the case of an unsuitable marriage would depend on circumstances. But, where a bond of provision is granted by one who is under no obligation to provide the child, under this condition, that she marry with the granter's consent, then the condition is strictly interpreted, and the bond will be found null if she marry without his consent, be the marriage, in the opinion of others, suitable or not, as he is not bound to assign the reason of his dissent. And so far has this been carried, that even where a father, who had before competently provided his daughter, gave her an additional provision, which was to become void in case she married without his consent, the irritancy has been found incurred where she married without his consent, although the match was suitable. But where the consent required in the condition is not the consent of the granter himself, but of other persons therein named, How far

No 35.

A person under no natural obligation to provide, granted a bond to a Lady, under the condition that she should marry with the consent *in writing* of the donor. She married without it, yet the bond was found due. But there were circumstances interfering approbation.

No 35. the irritancy will, in that case, take place, where they cannot give a reason for their dissent, may be a question.

What will import a consent, has on some occasions, been disputed ; and there are cases, when the granter was under no obligation to provide, in which the Lords have found that nothing less than an express consent could validate the bond ; that the person's being present at the marriage and his silence thereat, nay, that even his signing witness to the contract of marriage was not sufficient to infer that consent which was required by the condition of the bond, unless it had been specially mentioned and treated upon ; which was carrying the matter too far, especially as no particular form of consent was, in these cases, required by the bond of provision.

It is more dubious where a particular form of consent is expressed in the bond ; yet, so far have the Lords receded from the strict construction put upon the clause by the foresaid judgments, that, even in that case, they have found the consent implied from circumstances, although it had not been given in the precise form required by the bond.

Of this there was a strong instance in the present case, being of a bond of 4000 merks granted by Elizabeth Edwards, relict of Sutherland of Kinminnity, to Mary Sutherland, her husband's daughter of his former marriage, under a condition in these words : ' Declaring always, that the said Mary Sutherland ' shall be bound and obliged to marry with my consent, had and obtained ' thereto, *by a writing under my hand* ; and, if she does in the contrary, or dies ' unmarried, then, and in these cases, the foresaid bond of 4000 merks shall ' fall, accresce, and belong to me.' Which bond the LORDS ' Found to be due,' although she married privately without the knowledge of the granter, in respect of certain circumstances, from which her approbation thereof was found to be inferred.

Whether these circumstances were rightly sustained or not, supposing equipollent circumstances sufficient to purify the condition of the bond, and upon which the Court was much divided, is not material to state, as a circumstantial case can be of little use as a precedent to any other.

N. B. It did not appear in this case, that Mary Sutherland, when she married, knew of the bond at all : Had she known of the bond, and the condition been concealed, it might have afforded an argument against the irritancy's being incurred ; but as she knew nothing of the bond itself, and that the granter was under no obligation to acquaint her of it, the circumstance of her not knowing of the condition was thought to import nothing.

Fol. Dic. v. 3. p. 158. Kilkerran, (CONDITION) No 1. p. 145.

1774. February 9.

JEAN GRAHAME and her HUSBAND, *against* BAIN and GOVAN, two of the Trustees of SAMUEL STEVENSON, deceased.

SAMUEL STEVENSON merchant in Edinburgh, devised his whole subjects, heritable and moveable, in favour of Janet Irvine his wife, Alexander Kincaid, James Bain, and William Govan, in trust, for the ends and purposes therein mentioned, or such of them as should accept, and survivor or survivors of the acceptors, and such other persons as might be assumed trustees, as therein directed, it being his intèntion, as declared by his settlement, that the accepting trustees may be as seldom as possible under the number of four.

By this deed, after directing the trustees to pay his debts, an annuity to his relict, another annuity to his son, and to apply a certain yearly sum for the behoof of his two grand-children by his son, and for the use of each of his three grand-children by his daughter, of whom Jean Grahame is one, till they should respectively attain the age of twenty-five; and, at a certain period, to pay the sum of L. 200 to each of his grand-children by his son; *lastly*, He ordained that so much of the stock should belong to each of the grand-children, as, with the respective sums formerly advanced to them, should make them all equal, and that sum to be paid to them at their attaining the age of twenty-five years. He further ordered, that the two sums set apart for answering the annuities, should belong to the five grand-children equally; and, failing any of them by death, the share or shares of those deceasing, so far as remaining unpaid, are provided to the survivors equally; and the trustees are appointed tutors and curators to the grand-children during their minority.

The clause which gave occasion to the present question, runs in these words: 'And it is hereby specially conditioned, provided, declared, and ordained, that, in the event of any one of my said children marrying, without first having advised with my trustees, and having previously obtained the consent of the majority of them, regularly entered in the sederunt book after mentioned, and duly signed, then, and in that case, the grand-children so marrying shall forfeit all future claim to any part of the subjects hereby conveyed, excepting only the interest annually of such part of the provision above mentioned, provided to such grand-children so married, as may at the date of the marriage remain unpaid;' which annuity is thereby ordained to be paid by the trustees accordingly, as an aliment to his said grand-children, not affectable, &c.; and, at said grand-child's death, the sum so liferented shall pertain to his or her children, and be administered by his said trustees, and divided in such manner as they shall think proper; and, failing children, to pertain to his other grand-children equally.—Then follows a *proviso*, that it shall not be in the power of the trustees to pay any sum to any grand-child so married without their consent, except the foresaid annuity. But, on the other hand, that it shall be in the power

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There was a clause in a settlement by a grandfather, importing that, in the event of his grandchildren marrying, without first having consulted his trustees, and obtained the consent of the majority of them, regularly entered in the sederunt-book appointed to be kept by them, and duly signed, the grandchildren so marrying should forfeit their provision under that settlement. It was found, that as two of the trustees had verbally consented, and no dissent by the other two had been minutes, the omission of a signed consent in the sederunt-book did not occasion a forfeiture.

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of the trustees, upon the marriage of any one of the grand-children with the trustees' consent, at the first term after such marriage, to make a calculation, and strike a division, and to pay up the whole of the said grand-child's provision, though such child shall not have attained the age of twenty-five years.

An action was brought, at the instance of Jean Grahame, one of Samuel Stevenson's grand-children, by his daughter, and Thomas Hay surgeon in Edinburgh, her husband, for his interest, narrating Mr Stevenson's deed of settlement: That, in terms of said deed, the pursuer, Jean Grahame's share of her grand-father's means and estate, became due and payable at the term of Whitsunday last, being the first after her marriage, and concluding for the payment of the sum of L. 1600, as their just share and proportion of her grand-father's subjects, besides her share and proportion of the subject to be set aside for answering the two annuities provided by the will, when these annuities should cease.

The Trustees appeared to this action by their counsel, who endeavoured to enforce the validity of the clause requiring a consent of the trustees, previous to the solemnization of any of the grand-children's marriage; but the Lord Ordinary pronounced the following interlocutor: ' In respect it is not denied by the trustees, that two of their number, viz. Mrs Stevenson and Mr Kincaid, previous to the marriage between the pursuers, approved of, and gave their consent thereto; and, as no dissent or disapprobation is yet entered against the marriage by the other two trustees, Mr Bain and Mr Govan, finds, that the omission to enter the approbation and consent in the foresaid sederunt book, and to sign the same previous to the marriage, cannot have the effect to forfeit the claim now made by the pursuers in this action; therefore, decerns conform to the conclusions of the libel.'

Hitherto the whole of the trustees had concurred in the defence of the present action; but Mrs Stevenson and Mr Kincaid now declared, that they acquiesced in the Lord Ordinary's judgment; and declarations from them of their consenting to, and approving of the marriage, were produced in process. A reclaiming bill, however, was presented by the two other trustees, Bain and Govan, grounded upon the duty they owed to their deceased friend, and to their other pupils, and urging several topics for an alteration of the Ordinary's interlocutor.

1st, It was *contended*, That, with regard to no dissent or disapprobation of the marriage having been entered by themselves, it can be of no sort of consequence in the present case: That the marriage was concealed from them as long as either an assent or a dissent could have availed any thing; that is to say, till after the solemnization of the marriage. After that time, a dissent would have availed nothing; nor can the defenders see in what shape they were called upon to assent or dissent from the marriage, which had been concealed from them till it was consummated.

2dly, That the clause in question is a most legal, as well as a very rational stipulation, and lays no restraint upon marriage, which the law of this, or any other country, can judge improper.

3dly, That Mr Stevenson was under no obligation, moral or legal, to devise a succession to his grand-children. If he had been satisfied with the conduct of his son, he was his natural heir, and entitled by law to take up the succession; but he had already advanced to him very considerable sums of money, and had taken his discharge in full of all that he could ask or demand. He had also given his daughter, the mother of this pursuer, a sufficient portion. Mr Stevenson was, therefore, the full and unlimited proprietor of his whole estate, and could dispose of it as he pleased; and, if a man should even make a whimsical settlement of his fortune, of which some late instances have occurred, the law would give full force to such deeds.

But the rule is still stronger, when a person thinks proper to settle his estate upon those who are otherwise strangers to his succession. These must take the provision in their favours *tantum et tale*, as it stands devised to them. If they do not chuse it along with the conditions which attend it, they may repudiate it, but can complain of no wrong being done to them. If, indeed, unreasonable conditions are annexed to bonds of provision, granted by a man to his own children, who have a natural and just claim to a share of his effects, a court of equity may interpose to relax some of these unreasonable fetters; but no instance can be pointed out where such a stretch has been made in favour of strangers. Several decisions where this distinction has been adopted by the Court, at different periods of our law, are cited in the Dictionary, *b. t.* And so it is also laid down by Lord Bankton, vol. I. p. 114.

Nor is the plea of the defenders affected by the pursuers quotation from Mr Erskine, b. 3. tit. 3. § 85. where it is said, 'When the granter lay under no natural obligation to provide the grantee, such conditions were by our old custom strictly adhered to; Rae, No 25. p. 2966. But the irritancy has been, since that time, so softened, that, if the consent be refused unreasonably, the grantee may marry without consent, and be nevertheless entitled to the provision; Foord, No 29. p. 2970.' If a consent had been asked from the defenders, previous to the marriage, and they unreasonably refused it, this would, no doubt, have been restraining the natural liberty of marriage, and consequently have been deemed illegal: But the case is here widely different; no such consent was ever asked from either of the defenders; in which case, neither Mr Erskine, nor any other lawyer, or decision, has said the grantee is entitled to the provision left to them by a stranger; and the case of Foord, quoted by Erskine, when looked into, affords an additional decision in support of the defenders plea.

The pursuers plea, that the condition ought to be ineffectual, as not being notified to the legatees, proceeds upon a mistake. And the only remaining point to be considered, is the influence which the alleged consent, obtained

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from Mrs Stevenson and Mr Kincaid, ought to have upon the present question.

In the *first* place, the period at which these consents were alleged to be obtained, is not fixed; and the defenders do deny, that it consists with their knowledge, that any such consent was either asked or obtained.

But farther, in point of law, the consent, as alleged to have been obtained from Mrs Stevenson and Mr Kincaid, was not a consent of that nature which could purify the condition, upon performance of which alone the money was to be paid. Mr Stevenson does, in express terms, require the consent of the majority of the trustees, and that consent to be entered in the sederunt book, and signed by them. This was requiring a proposal of that nature to be regularly laid before the trustees, assembled in a body, when they should have an opportunity of communicating their sentiments to one another, deliberately weighing the circumstances of the case, and then returning such an answer as should seem proper to the majority of them.

It was said, and, indeed, the Lord Ordinary's interlocutor finds, That the omission to enter the approbation and consent, and to sign the same previous to the marriage, cannot have the effect to forfeit the pursuers claim. But the answer to this is perfectly obvious; such a consent as is alleged to have been obtained, could never have entered that book. The sederunt book, as its very name imports, can contain nothing except what is done at a full meeting of the trustees; or, at least, when a quorum of them is assembled. It is impossible to suppose that every rash word, dropped in conversation by any one of them, relative to the trust affairs, is to find its way into that book. Nothing can be entered in it, except their well advised and deliberate acts, when assembled together for the purpose of transacting business.

THE COURT 'refused the petition, without answers.'

For Pet. Ch. Hay.

Fol. Dic. v. 3. p. 158. Fac. Col. No 106. p. 282.

No 37.

A father granted a bond of provision to his daughter, supposing her unmarried, to be null if she married without his consent. She had been previously married, at which her father expressed dissatisfaction, though he re-

1781. November 27. THOMAS HAY against WILLIAM WOOD.

By a postnuptial contract between William Wood and Lady Catharine Cochran, a considerable sum of money, payable at the death of the former, was settled on the issue of their marriage. Lady Catharine died in October 1776, leaving an only child, Anne Wood; to whom Mr Wood, her father, then granted a bond of provision; by which, 'for the love and affection he bore to her, his only daughter, he obliged himself to pay to her, her heirs, &c. the sum of L. 1000 at the first term of Whitsunday or Martinmas next after her marriage, whenever the same might happen,' with interest from the term of payment; 'providing always, That in case the said Anne Wood should marry without his consent, that the said bond should be as void as if the same had never been granted;' and declaring also, That the said sum should be imput-

‘ed in part of what she might be entitled to in virtue of the contract of marriage betwixt her mother and him.’—This bond, when executed, was deposited in the hands of the Earl of Selkirk, a relation of Lady Catharine’s.

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ceived her in-
to his family.
The bond
found not exi-
gible.

Several months before the date of the bond, Anne Wood had been privately married to John Henderson, of the island of Jamaica, a student of physic in the University of Edinburgh; which being without the knowledge of her father, he, for some months afterwards, remained totally ignorant of that event. Upon discovering it, he was much dissatisfied; but soon consented to receive the young couple into his family, where they continued to live for upwards of two years; yet, in the meantime, it appeared, he made, though not judicially, frequent demands on the Earl of Selkirk, for re-delivery of the bond. At length Mr Henderson and his wife granted an assignation of that right to Mr Hay, as trustee for his creditors; who, in an action against Mr. Wood, insisted for payment. And, in support of this action,

The pursuer *pleaded*; The condition in the bond, relative to the marriage of Anne Wood, without the consent of her father, affords no defence against payment. Restraints upon the freedom of choice in marriage are viewed by the law with an unfavourable eye. Hence, conditions importing such limitations, when they occur in bonds of provision by parents to children, do not receive its support. In such provisions, indeed, as are altogether gratuitous, or proceed from strangers, not bound by any antecedent obligation to grant them, those conditions are not ineffectual; nor are they without effect, even if additional provisions are bestowed by a father on children who are already competently provided for, and who have begun to enjoy their portions. But the present case relates to a provision given by a father, and which is not additional; as it is to be imputed in extinction of the former! For though, by substituting the period of the grantee’s marriage, instead of that of the death of the grantor, the term of payment might be anticipated; yet such anticipation is in no proper sense gratuitous. Parents are bound by a natural obligation, to afford a suitable provision to their children when settling in business: or, if they are females, when entering into marriage. The latter obligation was strongly enforced by the Roman law, which compelled fathers “*dotare filias*,” *l. 19. ff. De rit. nup. ; l. ult. C. De dot. prom.* The condition, therefore, ought not to be effectual. At any rate, it can only be justly interrupted consistently with a rational object, that of securing a proper match for the young Lady; not as an ultimate condition, but as a means to that end; *Prin. of Eq. b. 1. p. 1. c. 4. art. 3.* And, in fact, as her marriage was suitable, so the end has been attained.

But farther: The condition was truly impossible, the marriage being antecedent, Now, not only in deeds *mortis causa*, but in bonds of provision by parents to children, impossible as well as unlawful conditions are, by our lawyers, held *pro non adjectis*; Lord Bankton, vol. 1. p. 96.; Ersk. b. 3. t. 3. § 85. And, in the civil law, the very case in question is decided; *l. 45. § 2. ff. De legatis ; l. 10.*

No 37. § 1. ; l. 11. pr. ff. *De cond. et demonst.* ; Voet, § 28. *ad tit. ff. De cond. instit.* Nor can this condition be so extended by interpretation, as to include a prior marriage as if it had been posterior : for it is not a suspensive one, but evidently resolute ; and as it imports a penal irritancy, it ought to be strictly interpreted.

In the last place : It is to be observed, that the defender, by receiving into, and entertaining in his family, for more than two years, his daughter and her husband ; by manifesting a perfect reconciliation ; and by having made no formal or judicial demand of the bond itself from the Earl of Selkirk, with whom it was deposited, has, *rebus ipsis et factis*, consented to the marriage ; so that by his ratihabition the condition has actually been implemented. And were his conduct not to have that effect, the hardship which would result from it to the creditors, who now are requiring payment of debts arising from loans or furnishings into which they were thereby betrayed, is apparent.

Answered for the defender : In every gratuitous obligation *inter vivos*, conditions and qualities are to be strictly observed ; 17th January 1673, Rae against Glass, No 25. p. 2966. ; 13th February 1680, Buchanan against Buchanan, No 26. p. 2968. ; M'Kenzie *contra* the Creditors of Kinminnity, No 35. p. 2977. The bond of provision in question was a gratuitous deed : for though by a constitution of the Emperors Severus and Antoninus, founded on circumstances then peculiar to the Roman empire, fathers were obliged *detare filias* ; yet in our law no such obligation exists ; Robertson *contra* her Father's Heirs, *voce* PARENT and CHILD. Without implement then of its condition, there could not arise any claim from that deed ; Stair, b. 1. tit. 3. § 7. ; Voet, tit. *De cond. instit.* § 16. If, therefore, the condition were impossible, as the pursuer contends, the bond must fall to the ground ; since conditions in deeds *inter vivos* are disregarded only when the granter had lain under a previous natural tie to execute those deeds ; Stair, *loc. cit.* ; Erskine, b. 3. tit. 3. § 85. ; Bankton, b. 1. tit. 5. § 29. Nay, though the bond had not been gratuitous, but had constituted the grantee's sole provision, its condition would not, as having a tendency *contra libertatem matrimonii*, be totally disregarded. It would only be restricted to a rational effect.

But it would seem that there did not really exist, in this case, any obligation to be the subject of a condition. The bond was granted to a certain person, in certain circumstances, when there were not in existence any such person and circumstances. It was granted to Anne Wood, as an unmarried daughter, with a specific reference to that state ; nor was it payable but at a term posterior to her marriage, considered as a future event : yet, before the date of that deed, she was the wife of Mr Henderson. In these circumstances, no right from it could accrue to her. Its object had thus no more relation to her in that situation than to any stranger. The consent necessary to constitute an obligation, was as much wanting in the one case as it would have been in the other.

Even supposing it possible, that, in such a case, an obligation might be constituted, still, as it must have arisen from error and deception, it would not remain effectual. Had the defender not been deceived, and by the undutiful conduct too of his daughter, he would not have granted the bond; and it were unjust on any occasion, but especially on this, to give effect to a mere consequence of deceit; *l. 72. § 6. ff. De cond. et demonst.* Lord Deloraine *contra* Dutchess of Buccleugh, 7th December 1723. See FRAUD.

Since, then, either no obligation has existed, or such only as the law will not countenance, it follows, that there is no room for homologation, which can only be applied to a once subsisting legal obligation. Nor in fact could it be inferred from the humanity of a father, which would not suffer his daughter to remain unsheltered in the streets; or from that delicacy which rendered him unwilling to repeat, in a judicial form, a demand for redelivery of the bond, which, in a private manner, he had frequently urged on the Noble depositary, with earnestness and importunity.

The general opinion of the Court was, That the bond had created a valid obligation, which might be homologated; though some of the Judges maintained, that the circumstances of the grantee not corresponding to the views of the granter, the deed was *ab initio* void.

THE LORDS finally found, That, by the failure of its condition, the bond had been rendered ineffectual; and, though capable of homologation, yet, in fact, as it appeared to have been redemanded from the depositary by the granter after his reception of his daughter and her husband into his house, that, notwithstanding this last circumstance, it had not been homologated; and, therefore, 'sustained the defences, and assoilzied the defender.'

Reporter, Lord Hailes. Act. Neil Ferguson, Tait. Alt. Ilay Campbell, Cullen. Clerk, Orme.
S. Fol. Dic. v. 3. p. 159. Fac. Col. No 6. p. 12.

1792. February 7.

LYDIA DOUGLAS, and her HUSBAND, *against* The TRUSTEES of SIR CHARLES DOUGLAS.

By a deed of settlement, Sir Charles Douglas conveyed to certain Trustees, for behoof of his younger children equally, of whom Lydia was one, considerable sums of money, and other property.

He afterwards executed a codicil, containing the following condition: 'That if my daughter Lydia hath already married Richard Bingham, son of the Reverend John (put by mistake for Isaac) Moody Bingham, or any other son of his, in such case or event, she shall not at any time derive any benefit or advantage from my said settlement.'

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No 38.

A father who had granted a provision to his daughter, having in an after deed inserted the condition, that if she married a certain person the provision should be void;

No 38.
effect was given the condition. But this was reversed on appeal.

Before Sir Charles' death, when this codicil came to the knowledge of his daughter, she was already married to Mr Bingham. She, however, had not been ignorant of her father's disapprobation of the match; which, notwithstanding, was universally allowed to be a suitable one.

Of the last mentioned deed she and her husband instituted a reduction, in order to set aside the irritant condition, and restore her to the benefit of the former settlement. In support of this action it was

Pleaded ; The condition in this case inferred a total forfeiture of the only provision given ; and yet it must be admitted that the match was not unsuitable. The benignity and the justice of our law will ever reject such conditions, as being not only *contra libertatem matrimonii*, but also *contra pietatem parentis*.

Thus Lord Stair says ; Such conditions are void, as against the freedom of marriage, which the natural affection of parents obliges them not to violate ;' b. 1. tit. 3. § 7. And Lord Bankton ; Clauses to that effect ' are rejected by our law, and the provision subsists notwithstanding the children marry without such consent, especially if they marry suitably ;' b. 1. tit. 5. § 29. In like manner Mr Erskine, b. 3. tit. 3. § 85. And to the same effect are a variety of decisions in Dictionary, *b. t.* though in some cases, when children had been previously provided, such conditions annexed to additional provisions were sustained. Also 9th February 1774, Graham *contra* Bain, No 36. p. 2979.

Besides, it is to be remarked, that the marriage had taken place before the condition was made known to the parties, and it ought not to be permitted to operate as a snare.

If indeed the father had not bestowed any provision at all on his daughter, no remedy perhaps would have been found ; but when he has himself confessed the extent of his natural obligation to provide, this ought not to be frustrated by a capricious or unnatural condition, which therefore must be held *pro non scripto*.

Answered : If the condition annexed by a father to the provision of his child be, that she shall marry a particular person, or not marry at all, it is invalid, as beyond the limits of parental authority ; and it is to such cases as these, that the opinions and decisions quoted on the other side are applicable.

But a negative upon a daughter's choice is a power that belongs to a father, which, though it may sometimes be capriciously exercised, it would be pernicious to abolish. Such was the power assumed by the father in the present instance, in which there appears nothing *contra bonos mores*, or really *contra libertatem matrimonii*.

The Lord Ordinary reported the cause. The Court were unanimously of opinion, that the condition ought not to be effectual, as being *contra libertatem matrimonii* ; for that the children having a natural right, and the father having

defined what he considered as a reasonable provision, this was not to be defeated by the adjecting of an unreasonable condition.

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It was also considered as a circumstance of importance, that the codicil was not communicated to the daughter before the marriage. But little stress was laid upon the *misnomer* above mentioned, though founded on by the pursuers.

THE LORDS reduced the codicil.

Reporter, *Lord Dregburn.*

Act. *M. Ross.*

Alt. *Abercromby.*

Clerk, *Home.*

S.

Fol. Dic. v. 3. p. 160. Fac. Col. No 205. p. 431.

*** This cause was appealed, and the HOUSE OF LORDS reversed the judgment of the Court of Session.

SECT. III.

Condition, whether to be understood Copulative or Disjunctive.

1677. *January 11.* BAILLIE *against* SOMMERVILL.

No 39.

THERE being a provision in a contract of marriage in these terms, that 5000 merks of the tocher should return to the father-in-law, in case his daughter should decease before her husband, within the space of six years after the marriage, there being no children betwixt them then on life; and in case the father-in-law should have heirs male within the space of six years after the marriage;

THE LORDS found the said provision copulative; and that the tocher should not return, albeit the father-in-law had heirs male within the foresaid time; seeing the other member of the said condition did not exist; in respect, albeit his daughter deceased within the said time, yet she had a child of the marriage that survived.

Reporter, *Gosford.*

Clerk, *Hay.*

Fol. Dic. v. 1. p. 191. Dirleton, No 423. p. 210.

1712. *July 17.*

DAME RACHEL NICOLSON, Lady Preston, *against* DR. GEORGE OSWALD of Preston.

No 40.

SIR THOMAS HAMILTON of Preston having infest Dame Rachel Burnet, his Lady, in an yearly annuity of 1200 merks out of his barony of Preston; in a

A Lady renounced her jointure, with

No 40.

this provision, that if it should happen, the party in whose favour she renounced, to die without heirs male of his body, or to have but one daughter; then, and in either case, the renunciation should be null. The renunciation was found null, upon his dying without an heir male, though he left several daughters.

contract of marriage betwixt Sir William Hamilton, Sir Thomas's eldest son and Dame Rachel Nicolson, his Lady's daughter of a former marriage in the year 1670, Dame Rachel Burnet granted a renunciation of the annuity, containing this clause irritant, viz. If it shall happen the said Sir William Hamilton to die without heirs male of his own body, or to have but one daughter; then, and in either of these cases *respective* foresaid, the renunciation should be null, and of no avail, strength or effect. Sir William having died leaving no heirs male, but only three daughters; Dame Rachel Nicolson his relict, who was assigned by her mother to the annuity foresaid, pursued a poinding of the ground.

Compearance was made for Dr Oswald, present heritor of Preston, who *alleged*, That the liferent annuity stood renounced.

Replied for the pursuer; The renunciation is not simple, but conditional and irritated, *1mo*, By Sir William Hamilton's dying without heirs male of his body; *2do*, By his leaving a daughter; the words, 'in case he have but one daughter,' importing if there be but so many as one daughter.

Duplied for the defender; The clause irritant must not be divided into two alternatives, but taken complexly as if it had run thus, 'If Sir William die without heirs male, leaving only one daughter, then the renunciation shall be null.' Now albeit Sir William wanted heirs male, he had several daughters, and so cannot be said to have but one; consequently, the irritancy is not incurred *in terminis*, nor yet in the meaning of parties. The Lady was allowed recourse to her annuity, if Sir William left only one daughter, and not in the case of his leaving more daughters; because, an estate is more incumbered with the provision of several children, than with the provision of one. This absurdity would follow from taking the controverted clause in a divided sense, so as to infer the irritancy from either the failure of Sir William's heirs male of his body, or the existence of one daughter, viz. *esto* there had been twenty sons and but one daughter, the second member of the irritancy would have been incurred. Now *verba ita accipienda sunt, ut illud de quo agitur magis valeat, quam pereat. Et quoties idem sermo duas sententias exprimit, ea potissimum accipitur, quæ rei gerendæ aptior est.*

Triplied for the pursuer; The words must have effect, though the consequence were hard; for *ita lex scripta est*; and by an old act of Sederunt, in the year 1713, the Lords declared they would interpret irritant clauses according to the express words thereof. And justly, seeing otherwise, contracts would not be the deeds of parties, but the deeds of their successors, and very often of their contradictors or opposites, and at best, of the Judges, who should advise what was most reasonable for the parties to have done and intended, taking their rule of conjecture from the present time and argument, though never so different from the inclination and circumstances of parties at the granting of the deed; *2do*, Neither is it absurd to make the irritancy take effect, as the pursuer pleads it should; for the grand-mother, in case of an heir male and no

daughters, ceded her jointure out of respect to the family ; but secured her return to it in the event of a daughter, that she might be in a condition to provide that daughter ; and though there might have been many sons, she did not think it worth her while to look to their provision ; because the sons of great families are generally better able to provide for themselves than the daughters, whose station and quality is a burden to them, and makes them miserable if unprovided,

THE LORDS found, That seeing there was no heir male of the marriage, the renunciation was void and null.

Fol. Dic. v. 1. p. 191. Forbes, p. 618.

1747. December 3. BOTHWELLS against The EARL of HOME.

ALEXANDER, Earl of Home, granted a bond of provision to his brother and two sisters, who were unprovided by their father, in these terms : ‘ We, with and under the provisions and conditions under-written, bind and oblige us to make good and thankful payment to Ladies Marjory and Margaret Homes, our lawful sisters, and to Mr George Home, our youngest lawful brother, of the sum of 20,000 merks, in manner, and according to the division under-written, viz. To ilk ane of the said Ladies Marjory and Margaret Homes, the sum of 7000 merks, and to the said Mr George Home the sum of 6000 merks, and that at the first term after their respective marriages or majorities, or after the decease of Anne Countess of Home our mother, which of the said three events shall first fall out ; together also with the due and ordinary annualrent of the just and equal half of the said principal sum, from and after the term of Martinmas next to come, and the annualrent of the said hail principal sum from and after the said terms of payment, which of them shall first fall out.’ By a subsequent clause it is provided, ‘ That in case of the decease of any of the said Ladies Marjory and Margaret, or Mr George Homes, before their respective majority or marriage, then and in that case, if one of them deceased, her part and portion of the sums should *ipso facto* fall and belong to the other two survivors equally betwixt them ; and in case of the decease of one or both of the said two last survivors, the portion of the deceasing should fall, accresce, and pertain to the said Alexander Earl of Home.’ Declaring that this bond should be in full satisfaction of all other claims competent to the said brother and sisters out of the succession of either their father or mother.

The two Ladies having survived their majority, took an adjudication against their brother, after which Lady Marjory died unmarried ; and Lady Margaret being married to Alexander Master of Holyroodhouse, conveyed in her contract of marriage her own provision, together with the half of her sister’s, as accresced to her by the substitution, Lady Marjory having died unmarried, to Henry Lord Holyroodhouse ; who assigned it to Mrs Eleanora, Mary and Anne

No 40.

No 41.

A person having left portions to younger children, payable on their marriages or majorities, or at their mother’s death, which-ever event should first happen, providing that the portion of any of them dying before marriage or majority should fall to the rest ; one of them having died before marriage, but after majority, the Lords found, that the condition of the substitution was not purified ; and that the portion went to her representatives, and not to the substitutes.

No 41.

Bothwells, his daughters, for their provisions; and they pursued an action of mails and duties against the estate of Home.

Pleaded for William the present Earl; That the Lady Marjory having survived majority, the substitution did not take effect, but her provision fell to her representatives, and, being rendered heritable by the adjudication, to her heir, which he himself was.

THE LORD ORDINARY, 21st June 1745, 'repelled the objection, that by the adjudication Lady Marjory's bond became heritable, and did thereby belong to the Earl; in respect of the substitution therein-mentioned, which was not varied by the adjudication.' And, 16th July, found, 'that the portion of Lady Marjory, who, it was agreed, survived majority, but died before marriage, did accresce equally to the Lady Margaret and Mr George Homes.'

Pleaded for the Earl; The substitution of the children to each other was not simple but conditional, if any of them did not reach the term when their provision became payable, which was at majority or marriage; and accordingly, if either died before majority or marriage, the substitution fell to take place, but it cannot be said Lady Marjory died before majority or marriage, when she survived majority. It is plain the terms of the sum becoming payable, of the commencement of the full annualrents, and of the evacuation of the substitution, were to concur; and as the two first happened at majority or marriage, so must the other.

Pleaded for the pursuers; The provisions in the Earl's bond were not gratuitous, the Countess of Home, mother to all the parties, having renounced part of her jointure, and discharged a debt due to her, as the valuable consideration of it; instead, therefore, of a strained interpretation being put upon it to the prejudice of the children, it ought to be explained beneficially in their favour. But this claim is founded on the express words, that if any of them should die before majority or marriage, the substitution should take place, and Lady Marjory has died before marriage; the question is not what would have been the case, if she had, in a marriage contract, conveyed her portion, and died before majority, the disposition for an onerous cause might have carried the sum, notwithstanding the substitution; but if she had married without conveying it, and died minor, the substitution must have taken place.

THE LORDS, 18th November, 'found, that the substitution was at an end, in respect that Lady Marjory died surviving the years of majority.'

They refused a petition, and adhered.

Act R. Craigie & Ferguson.

Alt. Lockhart.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 160. D. Falconer, v. 1. No 216. p. 297.

1757. December 16.

GEORGE CAMPBELL of Elister, *against* ARCHIBALD CAMPBELL of Jura.

ARCHIBALD CAMPEBELL of Jura became bound, in his daughter's contract of marriage with George Campbell of Elister, to pay the said George Campbell, at Whitsunday 1754, the sum of L. 166 : 13 : 4 Sterling, in name of tocher.

The contract contains this clause : ' Providing and declaring, That if the marriage dissolves within year and day after the solemnization thereof, *or without heirs procreate, and existing, of the same*, then the foresaid tocher is to return to the said Archibald Campbell,' &c.

There was a son procreated of this marriage ; but he predeceased his mother, who died in October 1754, after the marriage had subsisted two years.

In the year 1755, an action was brought against Archibald Campbell, for payment of the tocher stipulated to be paid by him.

Pleaded for the defender ; By the above recited clause in the contract of marriage, the tocher is provided to return, in two cases, *1st*, If the marriage should dissolve within year and day ; or, *2dly*, If it should dissolve without heirs procreated, and existing. These are separate and distinct conditions, and the words are clear and express ; so that there is no room left for interpretation, or presumptions of the intention of parties. And as the case has happened, that there were no heirs existing at the dissolution of the marriage, the defender is entitled to retain the tocher, which, in that event, was provided to return to him in case it had been paid.

Answered for the pursuer ; Although this contract is very inaccurately drawn, yet, from a fair and just construction of this clause, according to what must have been in the view of parties, it is evident, that no more was thereby intended, but that in case of the dissolution of the marriage within year and day, without heirs procreate and existing, the tocher should return. There was no double condition here : And the word *or*, according to the received and known interpretation clearly established in the civil law, may, and, agreeably to circumstances, ought to be construed, not in the disjunctive but conjunctive sense, being only explanatory of the former part of the clause ; and imports no more, than that in case the marriage dissolved within year and day, the bare procreation of a child should not preclude the return of the tocher, if the child was not existing at the dissolution of the marriage within year and day. The contrary construction, contended for by the defender, implies manifold absurdities. For, supposing the word *or* to establish two independent conditions, if the marriage had dissolved within year and day, by the husband's death, though there had been a child of the marriage then existing, the wife would have been entitled to her liferent provision, and the tocher must have returned. Again, supposing the marriage to have dissolved within the year, by the wife's predecease, though there had been a child procreated of the marriage then existing, the por-

No 42.

A man, in his daughter's contract of marriage, bound himself to pay a tocher, providing, ' that if the marriage should dissolve within year and day, *or without heirs procreate and existing*, the tocher was to return to him. A child was born, but died soon after, and the marriage was dissolved by the death of the wife, after about two years. Found, that the tocher did not return.

No 42.

tion must also have returned ; because, according to the defender's argument, the procreation and existence of children constituted a separate independent condition, nowise connected with the dissolution of the marriage within year and day : And in the other event, of the marriage dissolving, though at the distance of fifty years, after the procreation of perhaps twenty children, if these children did not exist at the dissolution of the marriage, the tocher was still to return. These, and others that might be mentioned, are so many glaring absurdities attending the defender's construction of this clause, that it is impossible it can be received.

Observation on the Bench ; The words of this clause are very strong in favour of the defender. The obvious import of the words is, 'That *quandocunque* the marriage should be dissolved, if there were no children existing, the tocher should return.' But the Court, *ex æquitate*, may reject the express words, and explain their meaning from the intention of parties, which is as clear on the other hand.

THE LORDS 'found, That, in respect it is acknowledged, that the marriage subsisted about two years, and that there was a child procreated of the marriage, who lived for several months, the pursuer was entitled to the wife's tocher, although the said child died before the dissolution of the marriage, by the death of the mother.'

Act. Lockhart.

Alt. Hew Dalrymple.

G. C.

Fol. Dic. v. 3. p. 161. Fac. Col. No 72. p. 120.

S E C T. IV.

Condition, when understood purified.—Condition of " being decerned," includes decerniture by Decree Arbitral.

1672. June 21. CARSTAIRS and RAMSAY *against* CARSTAIRS.

No 43.

A daughter pursuing for her provision, which was due to her failing heirs male of the marriage ; her claim was repelled,

JOHN CARSTAIRS, in his contract of marriage, having exprest this clause, that in case there were no heirs male of the marriage, so that the daughters would be totally excluded, the estate being all tailzied to heirs male, therefore, and for help and provision to the daughters, and failing heirs male of the marriage, and no otherwise, the said John and his heirs male and of tailzie are obliged, that if there be but one daughter to pay her L. 16,000 at her age of sixteen years ; Anna Carstairs, the only daughter of the marriage, pursues for payment upon

the foresaid clause.—The defender *alleged*, That the libel was not relevant, inferring payment on this clause, because it cannot be competent to the daughter, so long as there may be an heir male of the marriage, which cannot be yet said to failzie, both the father and mother being alive.—It was *replied*, That the father is, and hath been for a long time furious, separate from the mother; and furious persons use not to be capable of begetting children, and the mother is past fifty years; so that it is all alike as if the father or mother were dead.

THE LORDS found the libel not relevant, neither sustained the reply.

Fol. Dic. v. 1. p. 191. Stair, v. 2. p. 88.

No 43.
the father and
mother being
both alive,
though the
father had
been a long
time furious,
and the mo-
ther past
fifty.

* * Dirleton reports the same case :

A FATHER, in his contract of marriage, being obliged to provide the heir female of the marriage, and to pay to her L. 20,000 at her age of fifteen years, and until then to entertain her; there being only one child and daughter of the marriage, she and her husband pursued the father and his curators, he being furious, to pay the said sum.—It was *answered*, That the said provision being only payable to the heir female, the pursuer neither had nor could pursue upon that quality and interest during the father's life; specially, seeing both he and his wife, the pursuer's mother, were living, and of that age that they may have heirs male of the marriage, or other daughters; and if they should have male children, the case and condition of the provision would *deficere*, and not exist; and if they should have more daughters, the pursuer could not have right to the whole sum acclaimed.—It was *replied*, That the father was in effect *civiliter mortuus*; and the pursuers would find caution to refund, in either of the said cases.

THE LORDS found the defence relevant, and that such provisions being settled upon heirs female, by reason, and in case of exclusion of the heirs female of the marriage, when lands are entailed to heirs male, and there are no heirs male of the marriage, the term of payment could not be understood to be during the marriage.

Reporter, *Strathurd.*

Clerk, *Gibson.*

Dirleton, No 172. p. 69.

* * See This case by Gosford, *voce* PROVISION TO HEIRS AND CHILDREN.

No 44.

A proposal relative to a marriage portion contained this clause, "all which we offer, providing you give a suitable meeting on your part." Found that this clause was a condition affecting both the declaratory and the promissory part of the offer, and not being performed, the offer was void.

1672. July 10.

SHAW against LAIRD of CLACKMANNAN.

THE deceased Laird of Sauchy being in great burden, did dispone his estate to Clackmannan who married his daughter, and to Tillihidy, and had from them a back-bond or reversion; but thereafter he did subscribe an inventory of his debts, for satisfying whereof this disposition was granted; which being above the worth of his estate, he did grant a discharge of the reversion; thereafter, George Shaw, his apparent heir, having married the daughter of Mr Murray, a minister in England, who had a great estate in Moray, and no sons, Clackmannan and the rest to whom the lands were disposed, wrote a letter to Mr Murray, bearing, that George and his spouse might be infest in 3000 merks yearly, and that the lands would be worth 40 chalders of victual, and the coal worth L. 10,000 by year, and that the reversion of the estate would be very considerable, and that they should denude themselves of the estate upon payment of the debts; and the last clause of the letter is, 'All which we offer, providing you give a suitable meeting on your part.' The said George Shaw pursues Clackmannan who now has the whole right, to count and reckon for the rents of the land and coal, at the rental contained in the letter, and to denude himself upon satisfaction of the debts due after compt and reckoning. The defender *alleged* absolvitor, Because this letter did only contain a friendly offer to have procured a fortune for the pursuer from his good-father, whereupon nothing followed; and the last clause in the letter bearing an express condition relative to the whole offer, not only is the offer ineffectual, because it was not accepted; but it being expressly conditional, it is void, the condition neither having been fulfilled, nor offered to be fulfilled. The pursuer *answered, 1mo*, That the last clause in the letter is no condition, but only a motive to induce Mr Murray to give a portion with his daughter, wherein the defenders have no interest, for they were to have their money, whatsoever the portion was, and shall yet have it. *2do*, Though that clause could import a condition, yet it can only relate to the promissory part of the letter to denude, but not to the declaratory part, bearing what the rent of the land and coal was; and it cannot be thought that when parties express the truth upon conditions, but that what they asserted is simply true, otherways it had been a cheat to deceive Mr Murray; and the pursuer, though but apparent heir, hath good interest to cause the defender compt and reckon, and to instruct that the apprisings whereto he hath right, are satisfied by intromission; and, as to the discharge of the reversion, it was unwarrantably elicited, and was in trust. The defender *replied*, That the condition is clearly annexed to the whole offer, seeing it bears, 'All which we offer,' which must relate to the whole; and, there is no doubt, but conditions may be annexed both to promises and declarations; for *non agebatur*, that the

defender should bear witness to the truth, but that he should be willing to compt at such a rental, whether it was more or less than the true rental, which he would have been obliged to do if Mr Murray had accepted the offer, and performed the condition; and the defender's kindly offer then, for the recovery of the estate of Sauchy to his good-brother not being accepted, cannot now be made use of to his prejudice, nor doth it import that the discharge of the reversion was in trust; so that the pursuer having no interest, but the lands being irredeemable, not only by expired apprisings, but by his father's disposition and discharge of the reversion, the pursuer cannot, upon that letter, or any other ground, force him to compt, whatever the rent of the land or coal may be.

THE LORDS having interposed with Clackmannan to give reasonable satisfaction to the pursuer, his good-brother, if the lands were worth more than the sums that were upon it; but finding that they could gain no ground that way, and that the sums were like to be greater then the value of the land, they returned to give answer *in jure*, and found that the said last clause was a condition affecting both the declaratory and promissory part of the letter, and not being performed, that the offer was void, and therefore assoilzied.

Fol. Dic. v. 1. p. 192. Stair, v. 2. p. 96.

1697. January 20.

HUTCHESON of Scotstoun and his LADY, against DRUMMOND of Invermay.

I REPORTED Hutcheson of Scotstoun and his Lady against Drummond of Invermay, (for payment of 2000 merks contained in a bond granted by Stuart of Rossyth, to Walter Stuart his cousin, and assigned by him to Scotstoun,) as he who had received right to the estate of Rossyth, with the burden of all his debts.—*Alleged*, The bond bears its own dittay in its bosom; for it is clogged with two conditions and qualities; the first that it shall be void and null, if Walter die without heirs of his own body before the sum be uplifted; the second is, that *esto* it be paid, yet if Walter die without bairns, and leave as much estate as will pay this bond, then the same is to return again to Rossyth, his heirs and successors; and Invermay subsumed, that Walter deceased without heirs, and the sum being unlifted, the obligation became void by the first clause.—*Answered* for Scotstoun, That it must be held as uplifted, because Walter did *omne quod in se erat* to raise it; for he pursued Invermay for payment, and he advocating the process, Walter died before discussing, and assigned it; so *stetit per* Invermay, that it was not lifted, and being *ejus culpa, non debet lucrari*.—*Replied*, This process was only for constitution of the debt against Inver-

No 45.

A bond contained this clause, "that it should be void, if the creditor died without heirs of his own body, before the sum was uplifted." Found that an action for payment showing the intention to uplift, purified the condition.

No 45.

may *passive*.—THE LORDS found his pursuing sufficiently declared his purpose and intention to uplift it; and being delayed by Invermay, it was equivalent as if he had uplifted, so it fell not under the first clause; and *quoad* the second, (to whom it should return in case he died without heirs of his own body,) it was contended it behoved to return to Invermay, who was the heir of tailzie. —THE LORDS found it belonged to Lady Scotstoun, who was Rossyth's lineal heir of blood; and that the heir of tailzie was only heir in a particular subject. —Then the debate arose, if the bygone annualrents could be compensated with the aliment he received in Rossyth's family; and though it was alleged he had that as a servant, and no aliment is due *inter majores* without a paction; yet the LORDS, considering the nature of this gratuitous bond, and that *debitor non presumitur donare*, they found the annualrent compensible with the aliment.—The third point was, if his intromissions with Rossyth's victual and money rent, proven by receipts under his hand, were sufficient to make him comptable to this effect, that they may compensate against Scotstoun, his assignee; who *alleged*, That he never having a commission from any of the Lairds of Rossyth, as their Chamberlain, nor any written factory, what he received of the rents was only as their servant, and he is so designed in some of the receipts produced; and this intromission has been upon their verbal orders, and immediately delivered to them, and instantly ~~compted for~~ *de die in diem*, and so cannot make him liable, else it might ruin all the servants in Scotland.—*Answered*, Whether he had a commission in writ or not, *non refert*, for a *negotiorum gestor* will be liable to compt conform to his receipts; and though it be *in re antiqua*, yet he ought either to have a discharge, or else some stated accompt, to clear that these intromissions for which he gave receipts, came to his master's use.—THE LORDS thought the point of a general preparative, and therefore resolved to hear it in their own presence. See 17th Nov. 1665, Howison against Cockburn, *voce* PRESUMPTION; and 25th Nov. 1671, Irving against Falconer, *IBIDEM*.

After a hearing, the LORDS found any intromissions in this case could not exhaust nor compensate the bond, but might ascribe in payment of his annual-rents.

Fol. Dic. v. 4. p. 191. Fountainball, v. 1. p. 758.

1701. *June 25.*BORTHWICK *against* BORTHWICK.

No 46.

A party granted a bond of tailzie, obliging himself, if he succeeded as heir to his father, to resign in favour of the heirs of his body, with irritant clauses. After six years, his father disposed to him, with provisions inconsistent with the tailzie. The tailzie found not obligatory.

RANKEILLOR reported Borthwick of Fallahill against Borthwick of Craikstone. Borthwick of Craikstone, in 1660, grants a bond of tailzie, whereby he obliges himself, if he succeeds as heir to his father, to resign in favours of himself and the heirs of his own body; which failing, to Alexander Borthwick, his brother, with irritant clauses *de non alienando, et non contrahendo debitum*. Six years after this, old Craikstone marrying his said son to Riocarton's daughter, he disposes the estate to him in the contract of marriage, and there the tailzie nor irritant clauses are not repeated; but, on the contrary, 12,000 merks provided to the younger bairns of the marriage, and the spouse to 1200 merks of annuity; all which seemed inconsistent with the former tailzie: The said Alexander Borthwick of Fallahill pursues a declarator against Craikstone, as heir to his father on the said bond of tailzie, to resign and take the rights in the terms thereof, especially seeing inhibition was served thereon. *Alleged*, As the tailzie was never completed, so it was a latent deserted paper, never obligatory, but innovative, renounced and passed from, in so far as, posterior thereto, the father who remained fir of the lands, disposed the same simply to his son by his contract of marriage, without either mention or relation to the former bond of tailzie or resolute clauses therein contained; which was a plain and direct passing from the said tailzie: Likeas, Fallahill being the defender's tutor, he served him heir of line without taking notice of the tailzie, and accepted a wadset-right of a part of the tailzied lands, and did not defend him against the debts upon the tailzie; all which were manifest and downright contraventions thereof. *Answered*, That renunciations of rights is one of the hardest and obscurest presumptions in law, and ought to be clearly demonstrate, otherwise it ought not to be presumed; and though the contract matrimonial makes no mention nor relation to the tailzie, yet it noways revokes, casses or annuls it; and therefore what hinders it to stand; and the deeds condescended on are not so incompatible with it but they may both subsist. THE LORDS found the succession being put in another channel by the contract of marriage, the tailzie was not obligatory, nor effectual now, which was mainly designed in that event of his succeeding as heir; which never existed, seeing he got the estate *præceptione hereditatis* by a disposition in the contract of marriage, clogged with no irritancies, but rather clauses inconsistent therewith.

Fol. Dis. v. 1. p. 191. Fountainhall, v. 2. p. 116.

1708. February 5.

ALEXANDER SCOT, Writer in Edinburgh, *against* Mr GEORGE SETON of Gardinrose.

No 47.

The condition of 'being decerned,' found to include decerniture by decree-arbitral; unless, where the conditional creditor could allege a defence, upon which the debtor might have been assoilzied from the depending plea.

MR GEORGE SETON having, for love and favour to Janet, Margaret, and Mary Setons, his sisters, obliged himself, by bond, to pay them L. 1000 at the term therein mentioned, with this provision, That in case he were decerned to pay 3000 merks to Jean Kennedy for which there was a process depending against him, the bond in favours of his sisters should be void and null; the said process came not to a decision *in jure*, but being submitted, Mr George was decerned to pay the 3000 merks to Janet Kennedy by a decreet-arbitral. The sisters assigned their bond to Alexander Scot, who pursued Mr George for payment.

Alleged for the defender, That the bond was null, in so far as he was not assoilzied from Janet Kennedy's process, but forced to pay her the 3000 merks.

Answered for the pursuer, The bond stands good; seeing the defender was not decerned to pay the said sum by a decreet in the then depending process, in the terms of the bond. Payment by virtue of the decreet-arbitral, is not relevant to irritate the bond; because, the submission entered into without the pursuer's consent was unwarrantable, and cannot prejudice them whose bond was to take effect according to the judicial event of the process before the Lords.

THE LORDS found, That payment, by virtue of the decreet-arbitral, did irritate the bond, as if Mr George Seton had been decerned to pay by their Lordships decreet; and, that he was under no restriction by the clause in the bond, from submitting his process, to evite the expense of a plea.

November 12.—IN the pursuit at the instance of Alexander Scot against Gardinrose, for payment of L. 1000, contained in a bond granted by him for love and favour to Janet, Margaret, and Mary Setons his sisters, with this quality, That it should be null, if he were decerned to pay to Jean Kennedy, and Captain Monro her husband, any part of the sum of L. 3000 that they were pursuing him for; which bond was assigned to Alexander Scot; [the LORDS found, That payment made to the said Jean Kennedy and her husband, by virtue of a decreet-arbitral, was equivalent to payment upon a judicial decreet, and did irritate the bond; unless the pursuer could allege a defence whereupon Gardinrose might have been assoilzied from Jean Kennedy's process.

Fol. Dic. v. 1. p. 191. Forbes, p. 235. & 279.

1773. February 11.

JAMES WEMYSS of Wemyss, against WILLIAM BAYNE in Halhill, CHRISTIAN MOYES his Wife, and ALEXANDER BAYNE their Son.

JAMES Earl of Wemyss, the pursuer's father, by charter, dated May 27. 1746, proceeding upon a recital of his having received L. 5 : 5s. Sterling from William Moncrieff miller at Methel-mill, disposed, in feu-farm and heritage, and perpetually demised, in favour of Moncrieff, his heirs and assignees whatsoever, heritably and irredeemably, under the reservations, provisions, and conditions after expressed, the waulk-mill of Methel, with houses, biggings, yards, and pertinents, with the water-gang of the said mill; and also that piece of land lying immediately be-north the same; bounded as therein described, particularly by the corn-mill-lead of Methel-mill, 'reserving to us, our heirs and successors, the 'hail water of the said waulkmill, in case of scarcity, to our coal-works at 'Kirkland, and the said corn-mill.'

By an after clause of same charter, and upon which the present question arose, it is provided, 'That, if it shall happen us, or our foresaids, to make 'water-works for draining coal, grinding corn, or otherwise, in that case, the 'said William Moncrieff, and his above-named, are, and shall be, bound to resign, *ad perpetuam remanentiam*, the foresaid waulk-mill, water, and water-gang, with the foresaid piece of land, in the hands, and in favour of us, our heirs and successors, upon repayment of the sum of L. 5 : 5s. Sterling.' By this feu-charter Moncrieff was to pay an annual feu-duty of L. 33 : 6 : 8 Scots; besides the public burdens.

Mr Wemyss of Wemyss, now become superior of these lands, brought an action against the defenders, as standing in the right of Moncrieff, the original grantee, by purchase, whereby, upon a recital of his 'having occasion to make 'sundry improvements upon the mill of Methel, water and water-leads before-mentioned; and of his finding it necessary for that purpose to have and resume the possession of the foresaid redeemable feu of the waulk-mill and pertinents; and that he had divers times required the defenders to have resigned the said waulk-mill, &c. upon payment of the five guineas, of which tender had been made, and the same refused; he concluded; that they should be decerned, for their respective rights of liferent and fee, to renounce and resign the premises in his hands, upon payment of the five guineas, and to deliver an effectual disposition thereof, containing procuratory of resignation *ad remanentiam*. And the Lord Kennet Ordinary having pronounced sundry interlocutors, decerning in terms of the libel, the defenders reclaimed to the Court.

Pleaded; The condition does not exist upon which the redemption was to take place. The condition is in these words: 'Providing and declaring, that if 'it shall happen us and our foresaids, to make water-works for draining coal, 'grinding corn, or otherwise, then, and in that case,' &c. The first thing to

No 48.

A superior, who had his vassal bound to resign his feu, if it should happen the superior to make water-works for draining coal, grinding corn, or otherwise, found not entitled to insist for the surrender, where he had not previously purified the condition by erecting the works.

No 48.

be done to purify that condition is, the raising water-works, which therefore must precede the redemption, to give the pursuer the command of the water of the waulk-mill. But, as this is not done, or any preparations made therefor, or any plan for water-works so much as concerted, the purposes expressed in the summons have no relation to any water-works whatever, nor to the uses for which the water-works, if raised, were to be subservient.

Answered; When the late Earl was feuing out his property, he was entitled to do it under such conditions as he thought proper; and, if the vassal accepted of his feu-right under these conditions, he is bound to submit to them. Although the reservation in the contract, of a power to redeem the lands from the vassal, is not absolute, yet it was certainly not the meaning of the superior, that the vassal should be allowed to judge of the propriety of his operations, or of the place where the works should be erected, or of the uses for which these works were intended. But, whenever the superior made intimation to him, that he was about to make water-works for mills, coal-works, or other operations, the covenant of parties certainly was, that the vassal was to make a surrender of the feu to the superior; although, were it afterwards to appear, that no such thing was intended by him, but only a pretence made to dispossess the vassal, he would certainly be well founded in a claim of damages, and to be again put into possession.—The erecting of water-works, upon the grounds of the lands in the feu-contract, would surely be a most sufficient reason for the superior's resuming the subjects; and, as it is very plain, that, until actual redemption, the superior was not at liberty to perform any operation whatever upon the property of his vassal; this clearly shews, that, upon a sound construction of the feu-contract, it was not necessary that the erecting of water-works should precede the redemption of the lands.

THE LORDS find the condition on which the defenders are bound to resign the subjects into the pursuer's hands has not yet existed; and remit to the Ordinary to proceed accordingly.

Act. M^cQueen.

Alt. Dean of Faculty.

Clerk, Tail.

Fol. Dic. v. 3. p. 161. Fac. Col. No 56. p. 149.

SECT. V.

Effect of a resolute condition.—Conditional provisions to Daughters.—Condition in a contract for Mariners' wages.

1676. December 12. DURHAM *against* DURHAM.

SIR ALEXANDER DURHAM having, upon deathbed, given bond to the Lord Clermont for 20,000 merks, and, at the same time, having ordained his nephew Mr Francis Durham, his apparent heir, to pay to Adolphus, natural son to the said Sir Alexander, 6000 merks; the said Mr Francis did, after the defunct's decease, grant bond relative to the foresaid bond, and to the order for Adolphus his provision; whereby he ratified the foresaid bond, and was obliged to pay the said provision to Adolphus, upon this condition, that the Countess of Middleton should warrant and relieve the estate of Largo from all inconveniences, and in special, such as might arise from his uncle's intromission with public accounts; and if the estate should not be free, in manner foresaid, that the said bond should be void.

The said Adolphus having pursued upon the foresaid bond, it was *alleged*, that it was conditional, as said is. And the defender did condescend that the estate was distressed for a debt of 20,000 merks, for which a decret was recovered against his heir.

THE LORDS found, notwithstanding, that the said resolute condition was to be understood so that the bond should not be void altogether, but only proportionally effeiring to the distress.

This decision, though it may appear equitable, appears to be hard in strictness of law, the precise terms of the condition being considered.

Reporter, *Newton*.

Clerk, *Hay*.

Fol. Dic. v. 1. p. 192. Dirleton, No 397. p. 195.

1705. July 27.

SIR GILBERT ELLIOT LORD MINTO *against* WILLIAM GORDON, Merchant in Edinburgh.

WILLIAM GORDON merchant having granted to my Lord Minto, when clerk to the Privy Council, an obligation in the terms following: 'Upon the safe arrival of my ship, the Royal Ann, at Leith, for which the Lords of her Majesty's Privy Council have been graciously pleased to recommend me to her Majesty, for procuring a pass to retire my effects from France, I promise to deliver, to Sir Gilbert Elliot, an hogshead of the best wine aboard as payment of his dues for extracting the said act of recommendation.' The Lord Minto

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No 49.

In a bond of ratification, a party became bound to pay a legacy, upon condition that the granter relieved an estate of all other inconveniences. Found, that this resolute condition ought not to void the bond entirely, but only proportionally according to the distress.

No 50.

A party bound himself, to pay a hogshead of wine, upon the safe arrival of a particular ship. This wine was to be the *donneur* for

No 50.
a recommendation in order to procure a pass to retire effects from France. The pass was not procured, yet the wine was found due, without regard to the arrival of the ship.

being informed that Mr Gordon had some wine arrived at Leith, pursued him before the Judge-Admiral for delivery of the piece of wine, or L. 12 Sterling as the price of it, and obtained decreet.

Mr Gordon offered a bill of suspension, upon these grounds, 1st, The performance of the obligation being conditional upon the recommendation's taking effect, and the arrival of the ship the Royal Ann at Leith, and the condition never existing, the obligation fell.

Answered for the charger; The condition of the obligation could not be taxative as to the Royal Ann; for the wine might have been shipped in the Royal Ann, and she perishing by the way, brought home in another bottom; or Gordon, who inclined at the date of the obligation to transport his effects in the Royal Ann, might have afterwards altered his resolution, or the name of that ship might have been changed. 2do, If Gordon had designed to oblige himself only upon the event of the success of the recommendation, he should have expressed it so; for, *in dubiis*, words are always explained *contra proferentem*.

THE LORDS refused the bill.

Forbes, p. 39.

1738. July 7.

DRUMMOND *against* DRUMMOND.

No 51.

PROVISIONS to daughters, failing heirs male, are not due, if an heir male survive the granter ever so short a time.

Kilkerran, (PROVISION TO HEIRS AND CHILDREN.) No 1. p. 455.

1754. February 26.

DOROTHEA PRIMROSE, and Sisters, *against* His MAJESTY'S ADVOCATE.

No 52.
The condition *si sine hærede masculo decesserit* dis-appointed by the existence of a son, tho' he outlived the father but two months.

By a contract of marriage, dated 1724, between Sir Archibald Primrose and Lady Mary his wife, the former is bound to resign his lands, &c. to himself and heirs male of that marriage; which failing, to the heirs-male of any subsequent marriage; which failing, to his other heirs of tailzie; with the following proviso in favour of daughters. 'And, farther, in case there be no heir-male, but alle-narly a daughter or daughters of this marriage, &c. and that they shall be 'debarred from succeeding to the estate by Sir Archibald's other heirs-male, 'then, and in that case; Sir Archibald binds him and his heirs-male and suc-cessors in the foresaid lands, to make payment to the daughter or daughters, &c. 'viz. if one, 24,000 merks; if two or more, 36,000 merks, &c. and that at 'the first term of Whitsunday or Martinmas after his decease, &c. with annual- 'rent thereafter.'

Upon the 15th November 1746, Sir Archibald suffered death for high-trea-son, leaving issue one infant son and seven daughters. In January 1747, his son died. The daughters entered a claim for the 36,000 merks.

Objected for the Crown; That supposing Sir Archibald had died unattainted, the existence of the heir-male disappointed the purification of the condition, upon which depended the provision of the daughters.

Answered for the daughters; That as it is in reality the same thing to all the parties concerned, whether the sons die before or immediately after the father, it cannot be supposed that the parents intended the daughters a provision in the one case, and none in the other; and, in this case, the heir-male, an infant, died two months after his father.

But, *2do*, whatever might be the law where the father's decease is the term under the consideration of parties, yet that was not the case here; for the term under the consideration of parties, for regulating the daughters' provisions, is not the father's decease, but the first Whitsunday or Martinmas thereafter. For suppose two daughters had outlived the father, and one of them had died before the first Whitsunday or Martinmas after his death, it would have been supposed that only one daughter had existed of the marriage; and 24,000 merks, the provision for one alone, would have taken place. This being the case, although the son outlived the father, yet as he died before the term which regulated the provisions to the daughters, their provisions were certainly due. *See* Earl of Dunfermline *contra* Callendar, 27th June 1676, No 7. p. 2941.

Replied for the Crown; That however hard it may be, yet such is the principle of our law, that the condition *si sine liberis*, or *si sine hærede masculo*, has always been understood to be disappointed by the bare existence of such children or heir-male after the father's decease. And there is no speciality in this case to exempt it from the general rule. For though it is very true that the first term of Whitsunday or Martinmas after the father's decease was under the consideration of the parties, yet that was only for regulating the extent of the provisions for the daughters, and from whence that provision was to be payable and to bear interest. But the non-existence of an heir-male at the father's decease was the condition of the debt itself. *See* the cases of Somerville *contra* Tenant, No 11. p. 2949.; Lord Royston and Fraserdale *contra* Halyburton, No 16. p. 2955.; Drummond against Drummond, No 51. p. 3002. There was another point *argued* in this case, viz. the effect of the attainder against this bond, supposing the condition to have been purified; and the case of Margaret Oliphant, No 31. p. 2275. was referred to: but as the Court were unanimous upon the first point, this other was not determined.

'THE LORDS dismissed the claim.'

Act. Jas Fergusson, &c.

Alt. Alex. Home, &c.

Clerk, Pringle.

S.

Fol. Dic. v. 3. p. 160. Fac. Col. No 101. p. 150.

1778. February 10.

WILLIAM MORRISON and Others, *against* JAMES HAMILTON, and Others.

No 53.

Mariners were by agreement not to receive wages, till the ships' return to port. The ship was wrecked, but the wages were found due.

In May 1773, James Hamilton, and others, mariners, engaged with Morrison and Company, to navigate their ship *Rae-galley* in a voyage from Greenock to the Lewis; from thence to Philadelphia; thence to the bay of Honduras; and from thence to return to Greenock.

Articles of agreement were signed by the mariners, among which were the two following: 'No officer or seaman in the said ship shall demand, or be entitled to his wages, or any part thereof, until the arrival of said ship at the above-mentioned port of discharge in Greenock.' And, 'No wages to be paid till the vessel arrives in Greenock.'

The ship proceeded on the voyage, unloading and shipping cargoes at all the different ports, until her arrival at the bay of Honduras, where the vessel took in her fourth cargo; but, soon after sailing, was totally wrecked. The mariners having returned to this country, brought an action against their employers, Morrison and Company, for payment of their wages, from the time of their leaving Greenock, until the ship was wrecked.

The Judge-Admiral found, 'That the pursuers are entitled to their wages to the time of their finally unloading the said ship the *Rae-galley* in the bay of Honduras.'

The merchants having brought the cause into Court by suspension, the Lord Ordinary found the letters orderly proceeded. Against which judgment they reclaimed.

In this case, the same point occurred which was determined in the similar case of *Ross against Glassford* in the 1771*; that the mariners, at common law, in such a voyage, are entitled to their wages until the delivery of the last cargo before the ship is wrecked. This was again disputed by the merchants, on the same principles and authorities as then argued.

Pleaded separatim for the suspenders; The mariners are, at any rate, barred by the terms of the agreement, which they subscribed before sailing, from any claim for wages, which is thereby made to depend on the vessel's returning to Greenock.

Answered for the chargers; The only meaning of these articles was to prevent the mariners from demanding their wages at every port they arrived at, which, at common law, they were entitled to do. They are only suspensive of the term of payment, and proceed upon the hypothesis, that the ship was to return. The last article, in which it is said, 'no wages to be paid,' &c. explains and qualifies the first. These articles, therefore, ought not to be interpreted into a forfeiture of the wages which the mariners had earned, and would have had right to at common law.—But, although they could bear no other in-

* See APPENDIX.

terpretation, such a contract would be voided as unjust, and taking undue advantage of the mariners.

The COURT were of opinion, that the written articles founded on do not apply to this case, where the ship is wrecked, and cannot return: That the claim of the mariners must be judged of by the common rules of law, by which they are entitled to wages until the unloading the vessel in the bay of Honduras.

The COURT adhered to the Lord Ordinary's interlocutor, which found in the same terms with that of the Admiral.

Act. Ad. Rolland.

Alt. J. Campbell, Cha. Hay.

Fol. Dic. v. 3. p. 160. Fac. Col. No 10. p. 22.

Contract when conditional, when mutual; *see* MUTUAL CONTRACT.

For the meaning of conditional clauses; *see* CLAUSE.

Bonds of provision, donations *mortis causa*, legacies, &c. whether they imply the condition of survivance; *see* IMPLIED CONDITION.

Where the question is, Whether the clause imports a proper substitution or a conditional substitution? *see* SUBSTITUTE and CONDITIONAL INSTITUTE.

See Robertson against M'Kenzie, C. Home, p. 90, *voce* OBLIGATION.

See OBLIGATION.—*Pactum Illicitum*.—FACULTY.—PROVISION TO HEIRS AND CHILDREN. *See* APPENDIX.

CONFIRMATION.

SECT. I.

No real right is established by an infeftment *a me*, until it be confirmed.

1530. *January 27.* The KING *against* EARL CRAWFURD.

No 1.

GIF the superiour of ony landis callis and persewis his tenant, possessour of the samin, to heir and see the samin decernit to be in his handis, be resoun of non-entres of the richteous air thairto, the samin landis, or ony part thair of, pertening to ony Lady or woman in conjunct-fie, on na wayis sould be decernit to be in non-entres during the time and space of the said conjunct fie.

Fol. Dic. v. 1. p. 192. Balfour, (NON-ENTRY) p. 263.

1566. *March 6.*

The QUEEN and ALEXANDER HOME *against* GEORGE CRANSTON of Corsbie.

LANDIS gevin in conjunct-fie to ony Lady, to be haldin of the superiour, may not fall in non-entres induring the time of the said conjunct-fie, gif the superiour hes ratifyit and appreivit the samin, or gevin his confirmation thairupon, urtherwayis the samin landis may fall in non-entres, gif they be not confirmit be him.

Fol. Dic. v. 1. p. 192. Balfour, (NON-ENTRY), p. 263.

No 2.

Before confirmation the lands are understood to be in non-entry.

1620. *March 8.* BALMERNOC *against* COUTFIELD.

No 3.

AN infeftment of annualrent found null, *ope exceptionis*, because granted by the La. of Castlerig, and not confirmed, in respect he was forfault, albeit the party opposer had no right by the forfaulture.

Fol. Dic. v. 1. p. 192. Kerse, MS. fol. 81.

An infeftment of annualrent was found null, *ope exceptionis*, because granted to be holden of the King, and not confirmed.

1663. *January 16.* CAMPBELL *against* The LADY KILCHATTAN.

No 4.

In favorem of a relict's infestment upon her contract of marriage, for her life-rent-right, a base infestment to be holden of the superior not confirmed, is sufficient against a singular successor publicly infest.

IN the process, (No 35. p. 1302.) pursued by Major Campbell, compeared Hugh Hamilton, bailie of Edinburgh, and *alleged*, That he ought to be preferred, because he comprised against Kilchattan; and upon his comprising is infest, holding of the King as superior, before the Major's confirmation. It was *answered*, That Kilchattan being only infest by a base infestment, to be holden of the superior, and not confirmed, the comprising could comprise no more but the personal right standing in Kilchattan's person, the infestment being in-valid till confirmation; and the infestment upon the comprising signifies nothing till Kilchattan's infestment be confirmed; and therefore the Major's infestment of annual-rent being anterior to the comprising, the subsequent confirmation makes the infestment preferable.

THE LORDS repelled the allegiance. *In presentia.* See No 11. p. 3016.

Fol. Dic. v. 1. p. 193. Gilmour, No 62. p. 47.

1713. *July 10.*

JAMES DOUGLASS of Hisleside *against* WILLIAM SOMERVEL of Kennocks.

No 5.

A party served heir in general to the receiver of a disposition (who died infest *a me* without the superior's confirmation), renounced and discharged the disposition. The Lords found, the whole right in the defunct's person was conveyed by the general service to the heir, and the heir's discharge and renunciation were found to be a mid impediment, and effectual stop to any subsequent confirmation of the infestment *a me*, to him.

MR WILLIAM SOMERVEL having disposed the lands of Kennocks and Blantaggart to James Stuart son to Mr William Stuart of Hisleside, who was infest in the year 1670; Grissel Stuart spouse to Samuel Douglass of Hisleside, in the year 1683, after having been served heir in general to James Stuart her brother, did with her husband subscribe a discharge and renunciation in favours of William Somervel, of all right in their persons by virtue of any disposition or other right or title they could pretend to the lands of Kennocks. After the decease of Grissel Stuart, James Douglass now of Hisleside her son, served heir in special to James Stuart his uncle, as the person last vest and ceased in these lands of Kennocks, and commenced a proving the tenor of the said disposition and infestment, which were abstracted and amissing.

William Somervel *objected*, That the pursuer had no right to prove the tenor, because, 1. His special service is intrinsically null, as proceeding upon an infestment *a me* not confirmed by the superior at the time of the service, which infestment was null, or at most but a preparatory step in order to establish a right whenever a confirmation should be obtained; so that there was no subject for a service, that is no feu, which could not be constituted by a null, or at most a conditional infestment: And though the ordinary way of annulling services be by a great inquest, yet the Lords sustain reductions of services before themselves where the nullities are obvious. Nor can a confirmation lately impetrated by the pursuer, validate the service expedite before there was a right in being, to which James Douglas could be served, suppose it might make way for

a subsequent service. 2. *Ita est*, that before confirmation, the disposition in favours of James Stuart (which notwithstanding the infeftment *a me* not confirmed continued a personal right), was transmitted to Grissel Stuart his sister by her general service, and by her effectually discharged and renounced, as if no sasine had followed: Which general service and renunciation was such a mid-impediment as hindered the confirmation to operate *retro*, so as to validate the pursuer's infeftment from the date thereof. For Grissel being generally served, might have resigned upon the procuratory in the disposition, and completed her right, or might have conveyed her right to others, who might in the same way have rendered theirs effectual. And as the imaginary infeftment was no hinderance to the transmission in favours of Grissel; so after the right came in her person, she did so extinguish it, as there was no more place for confirmation. For clearing which point, it would be noticed, That the defender doth not plead, that the general service conveyed the disposition with the sasine *a me* taken upon it, which truly could not fall under any service, as being really no right, but merely a consent to establish a right, in case another party concurred, that did not exist till that concurrence was given; nor yet does he pretend, that the general service alone did make the infeftment *a me* to cease, or hinder it to become a valid right by confirmation; but what the defender urgeth is, That the whole right James Stuart had being conveyed to his sister, the same was legally and fairly extinguished by her renunciation, and so hindered the effect of any subsequent confirmation; or as our lawyers say, was a *medium impedimentum* to hinder the drawing back of the confirmation to the date of the sasine. It is not necessary in all cases, that a mid-impediment for hindering the conjoining a confirmation with a precedent sasine, be a real right established by infeftment, Dirleton's Doubts, tit. CONFIRMATION, Craig, Feud. lib. 2. Dieg. 4. § 19, Paton *contra* Stuart, *voce* SUPERIOR and VASSAL; which seems to be required only when more voluntary rights are granted by the same person, and the last right first completed would be preferred. But after all, it seems needless to dispute this point; since the question is not about a conveyance of the disposition made by Grissel Stuart which the receiver neglected to complete before this confirmation intervened; but about a total extinction of the right itself, which takes away all place for confirmation, as an accident cannot be without a subject.

Answered for the pursuer, 1. He being served heir in special by an inquest of 15 sworn men, is not obliged to defend the evidences upon which the service proceeded: The formal retour produced by him sufficiently entitles him to action, and cannot be thus taken away by exception. Again, it is *jus tertii* to any not pretending to be a nearer heir to the defunct, to quarrel the service; besides, there is no reason why an apparent heir may not pursue a proving the tenor of these very rights in which he is to be served. Nor was it necessary for the pursuer to have got a confirmation before his service; if what is daily practice, and the Lord Dirleton's opinion, page 25, be to be regarded. When our

No 5.

der it to operate *retro*, to validate the infeftment of another upon a special service, as heir to the obtain-er of the disposition.

No 5.

lawyers say, That an infeftment *a me* is null till confirmed, they do not understand it to be simply null, as a sasine is for want of its proper symbol; but null as to certain effects, viz. in a competition with a more complete right, or null by not taking present effect, and being as it were in suspense till confirmed by the superior, like *donatio inter virum et uxorem, quæ morte confirmatur*. So that albeit the sasine *a me*, was null or uncomplete *quoad* the superior, or a third party, vested first with a more solemn right, yet it is good against an heir who may be debarred *personali objectione* from quarrelling. 2. James Stuart's infeftment could be carried only by a special service, because had it not been more than a personal right, confirmation could not make it a complete real right. Its being rendered completely real by confirmation, implies that before such completing it was of the same nature as after, that is real; seeing confirmation (which is but an approving or ratihabition) might strengthen the right, but could not alter the very essence of it. 3. The infeftment *a me* is not carried by a general service (which conveys personal rights) because it hath several effects of a real right, the best proof that it is one; viz. it infers recognition, Lady Carnegy *contra* Lord Cranburn, *voce* SUPERIOR and VASSAL, Stair Instit. tit. EXTINCTION OF INFESTMENTS, § 11.; which an unregistered sasine doth not, as Craig observes; and yet an unregistered sasine is acknowledged to be a real right. The casualties of superiority fall *retro* from the date of the sasine *a me*, whenever confirmation is obtained, Stair, Instit. tit. INFESTMENTS OF PROPERTY; but no such casualties fall by a personal right, though confirmed by the superior. And infeftment *a me* would be a sufficient title in a mails and duties against tenants. 4. *Esto*, a sasine *a me* did not make a valid right till confirmation, yet the disposition on which it proceeds, is owned to be a valid personal right: Now the same arguments that are made use of to annul the infeftment, would also annul the disposition, which is the warrant of it, and properly that which the superior confirms. 5. Grissel Stuart's general service could be no mid-impediment; because even after that service she herself could have confirmed the sasine, and completed her right that way; and consequently, so could the pursuer, when his mother did no more but serve heir in general. Had Grissel Stuart, after the general service, resigned upon the procuratory in the disposition granted to her brother, and taken a charter of resignation and infeftment, that would indeed have hindered the pursuer's confirmation, to draw back, because two could not be vassals in the same right to the same superior: But she never having become vassal, it was entire to the pursuer to make use of the faculty he had of making himself vassal, by serving heir in special and confirming. Her renunciation could have no effect, because her general service could at most carry only the procuratory of resignation, which could not be effectually renounced; seeing the dispositive part and precept of sasine were not carried by the general service. Again, when our lawyers say, that an apprising is a sufficient mid-impediment to hinder a confirmation to draw back, they are to

be understood of a complete apprising. Because they mention apprisings against the disponent, and not apprisings against the obtainer of the disposition.

No 5.

THE LORDS found, That the whole right in James Stuart's person, by the disposition made in his favours, having been conveyed to his sister by the general service; her discharge and renunciation was a mid-impediment and effectual stop to any subsequent confirmation of the infeftment *a me*, which was once in James's person.

Fol. Dic. v. 1. p. 192. Forbes, p. 700.

SECT. II.

Confirmation of Infeftments to be holden *a me & de me*.

1680. July 15.

The BISHOP of ABERDEEN against The VISCOUNT of KENMURE.

No 6.

Sasine being taken upon an obligation to infeft *a se et de se*, without relating specially to either, a posterior confirmation was found to perfect the sasine *a se*, not only from the confirmation, but from the date of the sasine; upon which footing, the creditor in an annualrent right having died before confirmation, the annualrent right was found to be in the superior's hands by non-entry, who confirmed it.

THE Bishop of Aberdeen pursues a poinding of the ground of the baronies of Kenmure and Kirkmichael, upon an infeftment of annualrent.—It was *alleged* for Kenmure, heritor of these baronies, That the annualrent was in non-entry, by the decease of the Lord Whitekirk, who was infeft therein upon a precept relative both to the infeftment from his author, *a se et de se*, which not being confirmed in Whitekirk's life, the Bishop's retour should have retoured the annualrent, as being in the hands of Kenmure by non-entry, and not in the hands of the King, who was not Whitekirk's superior till the confirmation; *2do*, Whitekirk's sasine was null, as not having four witnesses.—It was *answered*, That such sasines upon precepts relating to infeftments, both public and base, are always applicable to either infeftment, as the party infeft pleases; and when a confirmation supervenes, the right becomes public, holden of the superior, and the confirmation perfects the sasine from the date of the sasine; so that the confirmation being before the Bishop's retour, the annualrent was rightly retoured, as in the King's hand, and Kenmure was never superior; and as to the sasine, four witnesses are only required to writs of consequence, to be subscribed by the granters, who cannot subscribe with their hand, and was never extended to sasines, or any instruments of notaries, proceeding upon a warrant sufficiently subscribed.

THE LORDS found, That if Whitekirk had taken infeftment expressly, to be holden of his author or successor, the annualrent would have been in non-entry till the confirmation; but, the sasine bearing applicable to both infeftments, *a se, et de se*; that the application made by the confirmation, did exclude the non-entry, and perfected the sasine *a se* from the date of that sasine; and found no necessity of more than two witnesses in a sasine.

Fol. Dic. v. 1. p. 193. Stair, v. 2. p. 786.

17 L 2

No 6.

* * * Fountainhall reports the same case :

OBJECTED against a sasine, that it wanted four witnesses, having only three, and so was null.—THE LORDS sustained the sasine. *Alleged*, The Bishop's was in non-entry. *Answered*, He had a charter of confirmation.—THE LORDS found, if the charter of confirmation be a charter *a me*, to be holden of the granter's superior, then the confirmation is drawn back to the date, and stops the non-entry so as to exclude Kenmure ; but if the charter was *de me*, then the confirmation does not stop the non-entry, for the confirmation of a charter *de me* excludes only the King from the casualty of recognition, but not from non-entry.

Fountainhall, MS.

* * * The following additional particulars are afterwards reported by Lord :
Fountainhall.

1680. *January 27.*

A COMPRISER of Kenmure's estate ratifies an annualrent furth of it ; thereafter the comprising is conveyed in Kenmure's person, and expires ; and he quarrels the annualrent after the expiration of the legal.—*Alleged*, He can never be heard, in respect of his author's ratification of it.—*Replied*, That militated against him indeed during the running of the legal, but cannot be obtruded now, never having redeemed nor used an order.—THE LORDS inclined to find Kenmure could not question this base infeftment, he being the apparent heir ; but it was not then decided.

Fountainhall, v. I. p. 127.

No 7.

1687. *June.* BOTHWEL of Glencorse *against* DEANS of Woodhouselee.

A SUPERIOR confirming an infeftment indefinitely, which had been taken both *de me et a me*, conform to clauses in a disposition for that effect, was presumed to confirm the infeftment *a me*, to make the right public, and he was preferred to the casualties ; and the base superior was not found liable to enter the vassal conform to his obligation in the disposition.

Fol. Dic. v. 1. p. 193. *Harcarse, (INFESTMENT.) No 609. p. 170.*

No 8.

Found in conformity with
No 7.

1688. *February 15.* LORD CHANCELLOR *against* CHARLES BROWN.

UPON the death of Robert Brown, who had an improper wadset of Gleg-horn's lands, affected with a back-tack, there was a process raised at the instance of the King's donatar of ward, for mails and duties of the land since the ward, and a liquidation of the heir's marriage.

Alleged for the defender, *imo*, Robert Brown was not the King's vassal, in so far as the wadset was to be holden *a me* or *de me*, and the confirmation being

indefinite of the infeftment taken on the precept, and the defender restricts it to the infeftment *de me*; and so the confirmation shall give him no benefit as the King's vassal; and if Gleghorny die, the casualties of the superiority will fall by his death; and the confirmation of the base right will only secure against forfeiture; *2do*, *Esto* the defender's ward were fallen, yet there being a back-tack never declared, and the defunct not in possession, the mails and duties cannot exceed the back-tack duties; and the confirmation is equivalent to the King's consent to the back-tack, which imports *non repugnantiam*; *3tio*, The wadset was a redeemable right, and the defunct had intromitted with the rents of the lands upon a comprising for the back-tack duties, which rents exceed these back-tack duties and sums in the wadset. Now this ought to be sustained against the superior, as well as it would be sustained against a singular successor in the wadset.

Answered for the pursuer; The indefinite sasine following upon a precept to take infeftment both *de me* and *a me*, answers to both holdings, and is presumed to respect the best holding, unless it had expressly borne the *tenendas* to be only of the base superior; and now the defender hath no election, *multo minus* after the casualty hath emerged; and therefore the confirmation must be applied to the infeftment *a me*; *2do*, The ward of the wadset lands falls to the superior, and the back-tack doth not restrict the right, but possession, in which sense it is not real *quoad* the superior, and must sleep during the ward, just like a tack set by the heritor: Nor doth the superior's confirmation import any consent but such as is congruous to his own right of superiority; for it is not to be supposed, that he intended thereby to prejudge himself of his casualties, which are usually reserved in confirmations; and a consent to a tack not in a way of confirmation, being no act of a superior, is stronger than a confirmation of the back-tack duties. And as a confirmation of a base infeftment would not hinder the superior to exclude the party so infeft from mails and duties, *multo minus* can the confirmation in so far as relates to the back-tack; but both must sleep during the ward; *3tio*, Intromissions with the duties of lands, after declaring of the back-tack, or other extrinsic intromissions, do not extinguish the wadset, as intromissions within the legal in appraisings do by act of Parliament, unless before the wadsetter's death application had been made by way of compensation. And though extrinsic payment to a wadsetter, even upon an unregistered discharge, or payment by poiding of goods, hath been sustained to extinguish the wadset, in prejudice of a singular successor thereto, yet that cannot be obtruded against superiors *quoad* the *reddendo* of their superiority.

THE LORDS repelled all the defender's three allegiances, in respect of the answers made thereto. And in the reasoning it was doubted by some, if the reverser might redeem the wadset during the minority.

Fol. Dic. v. 1. p. 193. Harcarse, (WARDS & MARRIAGES.) No 1012. p. 287.

No 9.

A purchaser of lands charged the seller to purge infeftments of annualrent on these lands. The Lords found the infeftments holden base of the grantor, might be sufficiently extinguished by resigning *ad remanentiam* in the seller's hands, who was the superior, and registering the same; but *quoad* the confirmed ones, found, that the confirmation made them public, tho' the sasine did not specially relate to the charter or holding *a me*, but was indefinite.

1699. July 25.

OLIPHANT *against* LINDSAY.

OLIPHANT of Williamston having charged James Lindsay of Dowhill to purge sundry infeftments of annualrent on the lands of Kinloch sold to him, conform to a clause in his disposition; and Dowhill producing renunciations thereof; and it being *objected*, That they were null for want of the registration within 60 days, conform to the act 1617.—*Answered*, They contained procuratories of resignation *ad remanentiam*, and they yet resigning, it would perfect the right and secure the singular successor.—*Replied*, *1mo*, The act 1669, anent registering resignations *ad remanentiam*, concerned only resignations of the property of lands, but not infeftments of annualrents; *2do*, Some of these infeftments are held base, and others of them confirmed. *Quoad* the *first*, The grantor being denuded, they could not resign for consolidation in his hands, seeing he neither had property nor superiority; and as to those confirmed, the King became superior, and there was no way to extinguish them but by getting new renunciations from such of the creditors annualrenters as were alive, and by pursuing the heirs of those who were dead to renew them, and on their renouncing, to adjudge.—*Duplied*, As for the base infeftments, resigning in Dowhill's hands will make them accresce to Williamston, the purchaser; and for the confirmed ones, they are not public, seeing the precept bore the two holdings, either *a me* or *de me*, and the sasine not applying it specifically to any, but indefinitely to both, it only secures against recognition and forfeiture; and it were a vast expense to put them to denude the heirs of the deceased annualrenters.—THE LORDS found, as to the infeftments held base of the grantor, they may be sufficiently extinguished by resigning *ad remanentiam* in Dowhill's hands, and registering the same; but *quoad* the confirmed ones, the LORDS found the confirmation made them public, though the sasine did not specially relate to the charter or holding *a me*, but was indefinite, as has oft been found, particularly 15th July 1680, Bishop of Aberdeen *contra* the Viscount of Kenmuir, No 6. p. 3011. But another point occurred to the Lords, whether a simple discharge or renunciation of an infeftment of annualrent, though not registrate, does not extinguish the said infeftment; seeing these annualrents can be paid and taken away by intromission with the rents of the lands, or by compensation; which point, as being new, the LORDS resolved to hear in their own presence.

Fol. Dic. v. 1. p. 193. Fountainball, v. 2. p. 64.

S E C T. III.

Confirmation of the Radical Right, whether it Validates all the Branches.

1635. December 4.

L. CRAIGIVAR and his DONATAR *against* AIKENHEAD.

No 10.

Confirmation of a charter, granted to a

THE Laird of Craigivar and his donatar craving declarator upon the liferent of Mr Adam Bothwell, of the lands of Glencorss, whereof Craigivar, as succeed-

ing in the Lord of Salton's right, of whom these lands were holden, was superior; in which process, Mr James Aikenhead, as donatar to the King of the same liferent, seeking special declarator thereon, compeared, and opposed against this declarator of Craigivar's, who claimed the same as pertaining to him as superior, and that the King had no right thereto, by reason that Mr John Abernethy was vassal of these lands to the Lord Salton, and proprietor thereof, which Mr John had disposed the same to umquhile Adam Bothwell, father to the said Mr Adam, and to the said Mr Adam heritably, by two infeftments, one to be holden of the said Mr John, and the other of his superior, (which infeftment granted to be holden of the superior, was not confirmed,) by the which charter subscribed by the said Mr John, granted to be holden of Mr John's superior, (*viz.* the Lord Salton, in whose place Craigivar hath come,) the said Craigivar and his donatar *alleged*, That the said Mr John's right to the casualty of liferent, was altogether excluded, and did cease, seeing he was denuded of all right which he had, both to the property and superiority of these lands; likewise the said Adam, and Mr Adam his son, who had acquired the said right, as said is, disposed the lands heritably to Adam Bothwell, son to the said Mr Adam, to be holden of the superior, with reservation of the said Adam, and his son Mr Adam, father to the youngest Adam, their liferent, which charter was confirmed by Craigivar; within three days, after the said Mr Adam, whose liferent was reserved, was put to the horn, and so long before he was year and day rebel; by the which confirmation, bearing the said reservation, and by the remaining of the liferenter year and day thereafter rebel, the liferent of these lands so reserved pertained to him as superior; and Mr James Aikenhead, donatar to the King of the said liferent, *alleging*, That the same pertained to the King's donatar, and could not pertain to any other superior, because Mr Adam was never vassal to Craigivar, neither by any original right nor resignation, nor by confirmation; and that confirmation of the right granted by Mr Adam to his son, confirmed by Craigivar, bearing the reservation of Mr Adam's liferent, cannot be sustained to make Mr Adam his vassal, except he had been his vassal before that charter confirmed, which cannot be shown; seeing by the contrary he was vassal only to the said Mr John Abernethy, and held of him; and whatever reservation of his liferent was made in the charter granted to his son, heritably to be holden of the superior, and which was confirmed by the superior, that cannot make him his superior; seeing his liferent was not constituted by that reservation, but was lawful and sufficient of before; and that reservation was only an exception annexed to his son's fee, with which it was affected, and transmits no right of superiority over his liferent, but only to the property given to the son, to be holden of that superior. And albeit it might be alleged that his liferent would not fall to Mr John Abernethy, his proper superior, in respect that he might be alleged to be denuded of all right competent to him by the charter, granted to be holden of Mr John's superior; yet the same accresceth to the King, seeing there was no other superior *ratione corona*, whereby he is

No 10.

son to be holden of the superior, was found a virtual confirmation of a liferent reserved to the father in the charter; and the father's liferent escheat was found to belong to the subject superior, and not to the King's donatar, who contended to be preferred, as if the father's liferent was a personal right, and held of no superior.

No 10.

justly reputed superior to all, when another cannot be shown.—THE LORDS repelled this allegiance, proponed for the King's donatar, and found the right of this liferent pertained to Craigivar, whom they found to be superior to this rebel, by this reservation contained in the charter granted by the father to his son, to be holden of the superior, and confirmed by him ; which reservation so made, and charter which bears the same, being confirmed, they sustained as sufficient to make him his vassal, although the rebel had right to the liferent of before, and found the superior's right not prejudged, albeit before his confirmation the liferenter was rebel some days before, and that thereby no right was acquired to the King, the superior having confirmed long before the year expired, and within a month after the date of the charter granted to the son, and so the superior was preferred to the King, and the sole reservation found enough to make him vassal.

Act. *Advocatus & Nicolson.*Akt. *Stuart & Gibson.*Clerk, *Scot.**Fol. Dic. v. 1. p. 193. Durie, p. 782.*1663. *January 15.* CAMPBELL against LADY KILCHATTON.

No 11.

FOUND, that a creditor confirming his author's base infeftment *ad hunc effectum* allenarly, to make his own valid, confirms the relict's infeftment also, which was in *eadem corpore juris*.

Fol. Dic. v. 1. p. 193.

* * * See The particulars of this case, No 35. p. 1302. and No 4. p. 3008.

1685. *March 17.* COLONEL MAINE against LADY EARLSTON.

No 12.

A PARTY before his committing perduellion, having resigned his estate in favour of himself in liferent, and his son in fee, adding this general clause, ' with and under the conditions and provisions contained in the procuratory of resignation ;' and having, in that procuratory, expressly reserved his Lady's liferent infeftment, the LORDS, in a competition betwixt her and the donatar of the forfeiture of her husband, found, That though the reservation in the public infeftment was in general terms, yet the Lady's liferent being particularly reserved in the procuratory of resignation, to which the general clause related, was equivalent to a confirmation ; and therefore preferred the Lady to the donatar.

*Fol. Dic. v. 1. p. 193.** * * See The particulars of this case by Fountainhall, *voce* BASE INFESTMENT, No 39. p. 1308.

* * * Sir Patrick Home reports the same case, dating it in March 1684.

No 12.

COLONEL MAINE having obtained the gift of forfeiture from the King, of Earlstoun estate, and having pursued for mails and duties ; there being compareance made for the Lady Earlstoun, who craved to be preferred to the rents of her jointure lands, by virtue of her infeftment being clad with possession before the crime was committed for which her husband was forfeit, her husband's possession, *fictione juris*, being her possession ;—*Answered*, That a base infeftment cannot secure against a forfeiture, unless the same had been confirmed by the King superior, or that the Lady had been publicly infeft upon her husband's father's resignation, who was the granter of the liferent right, as was decided November 1682, Dalzell against Caldwell, *voce* SUPERIOR and VASSAL.—*Replied*, That the right was confirmed, in so far as by an infeftment under the Great Seal, proceeding upon the Lady's husband's resignation in favours of himself in liferent, and his son in fee, the Lady's liferent is reserved, which resignation is equivalent to a confirmation ; seeing a liferent right may be constituted by a reservation.—*Duplied*, That the said infeftment does not bear a reservation of the Lady's liferent in particular, but only in general terms, with and under the conditions and provisions contained in the procuratory of resignation ; and albeit the Lady's liferent be reserved by a provision in the procuratory of resignation ; yet, unless it had been expressed in the infeftments following thereupon, it cannot be sustained against the donatar, who is a singular successor.—*Triplied*, That the general clause (under and with the conditions and provisions, restrictions and reservations,) contained in the procuratory of resignation, being insert in the infeftment under the Great Seal, and the Lady's liferent being particularly reserved by a provision in the procuratory of resignation ; it is equivalent as if it had been particularly exprest and reserved in the infeftment ; seeing a general relative clause in the infeftment doth comprehend all particulars to which that general clause relates, and is equivalent as if it had been particularly ingrosted and repeated in the infeftment. And the decision in the cause of General Dalzell against Lady Caldwell does not meet this case ; the Lady Caldwell having only a base infeftment, and there was no public infeftment granted by the superior reserving her right.—THE LORDS found, That the reservation in the public infeftment, albeit in general terms, yet the Lady's liferent being particularly reserved in the procuratory of resignation, to which the general clause related, was equivalent to a confirmation ; and therefore preferred the Lady to the donatar.

Sir P. Home, v. L. No 603.

1708. July 22. LADY RICCARTON *against* SIR JAMES BAIRD, &c.

No 13.

In a contract of marriage, an estate being disposed to the husband and wife in conjunct fee and liferent, upon which the husband and wife were infeft holding *a me*; a confirmation granted to the husband, was found to accresce to the wife, so as to validate her infeftment in a competition with real creditors.

THE competition betwixt Margaret Dalgleish, the old Lady Riccarton, and Sir James Baird of Saughtonhall, and other real creditors of Craig of Riccarton being reported, it was *objected*, That the Lady's liferent infeftment was null, because her sasine was taken upon a charter *a me*, and never confirmed till 1703, long after the creditors are infeft, which, as middle impediments, hinder her confirmation to be drawn back *ad suam causam*.—*Answered*, Her sasine relates only to a charter in general, which might as well be *de me* as *a me*; and the contract mentioning to infeft her both ways, it must be presumed to be upon both, *quæ fieri debent facile præsumuntur*; and the contract of marriage, though the remote warrant of the sasine, must be sufficient to support it; for *probatis extremis præsumuntur media*, especially *in re tam antiqua et favorabili*, as is the *materia dotis*; and the husband's right being confirmed, though in general, without mentioning her's, it must accresce to her, especially being fortified by 40 years possession. And President Gilmour observes, that the Lords sustained a wife's liferent infeftment on a charter *a me*, 15th Jan. 1663, Campbell, No 35. p. 1302.; and Home, No 5. p. 1690.; and 22d June, and 28th July 1637, Blairquhan *contra* Viscount of Kenmure, *voce* UNION.—*Replied*, The Lady's sasine can be ascribed to no other warrant but the charter *a me* produced, though it do not expressly mention it; and the husband's confirmation can never support it, it having no relation to her infeftment; yet *see* Norvel *contra* Hunter, *voce* PROOF:—THE LORDS sustained the Lady's infeftment, being clad with 40 years possession, notwithstanding no other immediate warrant appeared, but the charter *a me*, seeing the husband's confirmation accresced to her; and therefore preferred her to the real creditors, though they were infeft before her confirmation in 1703.

Fol. Dic. v. 1. p. 193. Fountainhall, v. 2. p. 457.

* * Forbes reports this case differently, thus:

IN a competition of the Creditors of Riccartoun, the Lady claimed preference for her liferent annuity of 2,500 merks upon her contract of marriage in December 1661, with Lewis Craig, then younger of Riccartoun, containing a procuratory of resignation and precept of sasine, wherein Thomas Craig his father provided him to the fee of the estate, and her (who brought 32,000 merks of tocher) to the said annuity, and obliged himself to infeft them in the fee and liferent *respective*, by two manner of holdings *a me* and *de me*; a charter *a me* granted to them by the said Thomas Craig in January 1662; a sasine of the same date, long prior to the creditors rights; and a charter of confirmation in anno 1703, which, though posterior, ought to be drawn back *ad suam causam*.

Alleged for the Creditors, 'The Lady's infeftment proceeding upon a charter *a me* is null, for not being confirmed before the Creditors right intervned, which mid-impediment hinders the drawing back *ad suam causam*.

Answered for the Lady ; Her father-in-law being obliged to infeft her both *a me* and *de me*, and the sasine relating to a charter in general, he is presumed to have done it *omni meliore modo*, and consequently to have granted charters both ways, conform to his obligation ; it being usual at that time so to do, and to give sasine upon both, *et quæ fieri debent et solent, facile præsumuntur* ; especially considering, that the contract of marriage is of the nature of a charter, containing a precept or sufficient warrant of a sasine, though no charter were produced ; and *in favorem matrimonii*, many things singular have been sustained. Nor is there any necessity now, after forty years, to produce the charter *de me*, which has been granted *ex superabundanti* for form's sake only, the contract, which is the remoter warrant, and the sasine, being produced ; seeing *probatis extremis, præsumuntur media* ; especially *in re tam antiqua, et materia favorabili*. So a contract of marriage was sustained to adminiculate a sasine in favours of a wife, whereof a separate bond, granted in implement of the contract, was the warrant, and not produced ; Norvel against Hunter, *voce* PROOF. 2do, *Et separatim*, though commonly a charter *a me*, is null till confirmation ; yet, infeftments upon liferent rights to wives, by virtue of their contracts of marriage, to be holden of the superiors, not confirmed, have been sustained against singular successors ; January 15, 1663, Campbell against the Lady Kilchattan, No 35. p. 1302. ; and preferred to intervening rights completed before confirmation ; 4th February 1629, Home, No 5. p. 1690. Nay, even before the act of Parliament 1695, a base infeftment in favours of a wife, not clothed with possession, was preferred to posterior public infeftments ; February 21, 1672, Reid against the Countess of Dundee, No 38. p. 1305.

Replied for the Creditors, If the charter *a me* be not the warrant of the sasine, but a charter *de me* not produced, the sasine is null, as wanting a warrant ; for the contract of marriage, which is not mentioned or referred to therein, cannot support it. And if the charter *a me* be understood to be the warrant of the sasine, the confirmation thereof could not be drawn back to the date of the charter and sasine, in prejudice of the creditors' intervening rights ; according to the maxim, *Confirmatio et confirmatum, non possunt conjungi, propter medium impedimentum*. Nor doth it alter the case, that the disponder in the contract of marriage, was bound to give infeftment either to be holden of himself, or of the superior ; Paton against Stewart, *voce* SUPERIOR and VASSAL. And albeit in favourable cases, law will presume a thing that ought to be, to have intervned ; presumptions cannot be received against plain evidences, nor two or more fictions concur in one point ; as, that the charter *a me* produced, was not the warrant of the sasine ; that there was a charter *de me* granted ; and that it was the warrant of the sasine.

No 13.

THE LORDS preferred the Lady's annuity to the real rights of the competing creditors completed before her confirmation, in respect her sasine was supported by her contract of marriage, providing her to that annuity, and bearing precept of sasine in the lands affected therewith, and by forty years possession, albeit a charter *de me* be not produced. For the LORDS considered that the sasine referred only to a charter in general, and that it was then the custom to grant charters *a me* and *de me*, and to take infeftment upon both at the same time; and that it is a presumption and not a fiction of law, that a charter *de me* intervened.

Forbes, p. 270.

SECT. IV.

Confirmation may be granted *quandocunque*.—What rights require Confirmation..

1634. July 17.

LO. JOHNSTON *against* E. QUEENSBERRY and JOHNSTON of Corehead.

No 14.

Confirmation was found valid, being granted at any time, either before or after the disponent's or disponent's decease, providing there was no intervening impediment of any other more lawful right made by the disponent before confirmation.

IN a double poinding for the mails and duties of the lands of Lochouse, claimed by the Lo. Johnston, as having right from the apparent heir of umquhile Captain Johnston of Lochouse, heritor of these lands, and who was in possession thereof at his decease, on the one part, and of the Earl of Queensberry, as being heir to the Lord Drumlanrig, his father, who was heritably infeft therein by disposition of the said umquhile Captain, by two infeftments, one base, and another holding of the superior; which infeftment to be holden of the superior, was confirmed by this Lord Queensberry, who had acquired the heritable right of the said superiority from the L. Calderwood, of whom the saids lands were holden; which confirmation was granted after decease of Captain Johnston, granter of the infeftment, and after the decease of the Lord Drumlanrig also, to whom the infeftment was granted. In this process, the LORDS appointed that there should be a sequestration of the duties of these lands in an indifferent responsible gentleman's hands, who, during the dependence of this action, should uplift the same from the tenants, and make payment thereof to the party, who should be found to have right thereto, at the end of the process: Which sequestration was so appointed, albeit it was only verbally sought at the bar by the Lord Johnston, the time of the disputing of this cause, and that the summons craved no such sequestration, neither was there any summons or action

No 14.

intended, or depending, craving sequestration; and albeit also the Earl and Johnston of Corehead *alleged*, There was no reason to grant the same, seeing they were in possession of the land by a great part thereof in mansing, and the rest by uplifting the duties thereof from the tenants; likeas, the Lord Johnston nor the apparent heir had any real right, which might be the ground of the sequestration; notwithstanding whereof, the sequestration was ordained for such duties as was not uplifted already, and in time coming, ay and while the process ended, so far as concerned the lands set to tenants, but not for the Mains possessed in mansing by Corehead; Also, the LORDS sustained the confirmation foresaid of the said public infeftment, although done after the granter's decease; which infeftment and confirmation thereof were found valid, done at any time whatsoever the superior pleased, either before or after the disponent's decease, at any time, where there was no intervening impediment of any other more lawful right, made by the disponent before the confirmation, really of the saids lands; in which case, if any such real right had been lawfully perfected before the confirmation, there might have been argument, that the confirmation might have been controverted, as not valid, after the decease of the disponent, as that thereby *confirmatio et confirmatum non possent conjungi post mortem, propter illud medium impedimentum*.

Act. Stuart et Cunninghame.

Alt. Advocatus et Nicolson.

Clerk, Scot.

Fol. Dic. v. 1. p. 193. Durie, p. 727.

1663. January 16. TENANTS OF KILCHATTAN *against* LADY KILCHATTAN.

No 15.

A CONJUNCT infeftment granted to man and wife, to be holden of the crown, being null for want of confirmation, it was *argued* for the wife, that her interest needed no confirmation resolving into a liferent, which is but a personal servitude, which was repelled.

Fol. Dic. v. 1. p. 194. Stair.

* * * See The particulars of this case, *voce* BASE INFESTMENT, No 1. p. 1259.

1669. July 23. JAMES GRAY *against* MARGARET KER.

No 16.

JAMES GRAY having apprised certain lands, and having charged the superior, pursues for mails and duties. Compareance is made for Margaret Ker, who produces her infeftment granted by her husband, the common author, prior to the apprising, and craves to be preferred. The pursuer *answered*, That her infeftment being granted by her husband, to be holden of the superior, not confirmed, is null. To the which it was *answered*, That an infeftment of a liferent,

Found as above.

No 16.

granted to a wife in implement of her contract of marriage, is valid, though not confirmed.

THE LORDS repelled the allegiance, and found the relict's infeftment null, and not sufficient to defend her possession.

Fol. Dic. v. 1. p. 194. Stair, v. 1. p. 643.

1760. December 11.

JOHN GRIEVE, servant to Dr George Grieve, physician in Peebles, *against*
JOHN WILLIAMSON, Cordiner in Peebles.

No 17.

Where a disposition is granted to one, and the heirs-male of his body, a charter granted by the superior, without resignation, confirming the disposition to the disponee in liferent, and to his son in fee, with infeftment following thereon, will not constitute the son fiar.

JAMES WILLIAMSON of Cardrona, by disposition, anno 1706, for love and favour, and other causes, disposed to Mr John Williamson, school-master in Peebles, and the heirs-male of his body, or the heirs-male of the descendants of his body, which failing, to return to the granter's heirs, certain burgage tenements in the burgh of Peebles, and five acres of land in its neighbourhood, holding feu of the Earl of Traquair.

These five acres were neither resigned in terms of the procuratory, nor was infeftment taken in virtue of the precept of sasine; but in 1709, a charter was granted by the Earl of Traquair, the superior, which confirms the disposition by Cardrona, *in omnibus capitibus et singulis clausulis, &c. secundum formam et tenorem ejus in omnibus punctis.* At the same time, this confirmation is not granted to Mr John Williamson, as sole fiar, in terms of Cardrona's conveyance, but thus: *Prædict. Magistro Joanni Williamson, in vitali reditu, et Jacobo Williamson ejus filio, in feodo.* Immediately after this, there is a clause of *novodamus* in the same terms; and the charter concludes with a precept of sasine for infefting the father in liferent, and the son in fee.

Upon this charter, infeftment soon followed; and the sasine bears delivery to have been made to the father and son personally; and that the father, *pro semet ipso, et in nomine ejus filii, instrumentum petiit, &c.*

From this time, down to the 1735, Mr John Williamson, the father, continued to possess as fiar; and, in that character, granted infeftments of annual-rent out of the lands. But the eldest son, James, having then died, John Grieve, one of his personal creditors, brought a process against John, the second son, as lawfully charged to enter heir to his deceased brother; and, upon John's renunciation, obtained a decret *cognitionis causa*, of date the 9th of January 1736; and thereafter proceeded to lead an adjudication.

Upon this, Mr John Williamson, the father, executed a disposition in favour of his son John, reserving his own liferent, and containing a substitution and return in conformity with Cardrona's disposition, and assigning him to the unexecuted procuratory, and precept therein contained; but soon thereafter, he was himself infeft upon the said precept, and appeared for his interest in the

process of adjudication brought by John Grieve ; in which a decret was obtained upon the 13th July 1736, reserving all defences *contra executionem*.

Immediately after this, Mr John Williamson, the father, brought a process of reduction against the Earl of Traquair, of the above-mentioned charter and sasine, on account of their being disconform to Cardrona's disposition ; and accordingly obtained a decret, reducing the same, upon the 18th of January 1737.

Mr Williamson having died a few years thereafter, he was succeeded by his son John ; who continued in the undisturbed possession for a considerable time ; but, at last, was called as a defender, alongst with his tenants, in a process of mails and duties, brought at the instance of the above-named John Grieve, upon the decret of adjudication obtained in the year 1736.

The defender produced Cardrona's disposition, and his father's infeftment, the disposition by his father to himself, and the decret of reduction, obtained against the Earl of Traquair ; and *contended*, That these were sufficient to exclude the pursuer.

Answered for the pursuer, *imo*, The decret of reduction obtained against the Earl of Traquair, who was the only defender called, can have no operation to the prejudice of any other person ; and, of consequence, cannot affect the right that stood in James Williamson, or cut off the interest of his creditors, or any claiming under him.

2do, As James Williamson stood upon record infeft in the fee, the pursuer was *in bona fide* to contract with him ; and therefore cannot be injured by any subsequent reduction of his right. And a similar judgment was pronounced by the Court, in the case of Mrs Stewart of Phisgil, whose infeftment was sustained, although her husband's right to the lands was set aside. *See GROUNDS and WARRANTS.*

3tio, The charter by the Earl of Traquair was sufficient, although it had contained no clause of *novodamus*, to vest the fee in James, by confirmation ; seeing that, by the terms of Cardrona's disposition, no more than a literent seems to have been intended to be given to the father.

4to, The clause of *novodamus* in the charter, with the sasine following upon it, made a proper and legal feudal investiture of the property in James.

5to, Supposing the charter liable to objection, as being disconform to the disposition, such objection was only competent to John Williamson, the father ; and as he homologated the alteration, by accepting of the charter, and by taking it *propriis manibus*, which supplied the want of a resignation, he could not afterwards retract. It was in his power to vest the property in his son in this manner ; and as he actually did so, he could not thereafter take the fee from him, or out of his *hereditas jacens*, either by a new infeftment in his own favour, or by a disposition to his son John. And so in effect it was found in the case of Cubbison against Cubbison. *See GROUNDS and WARRANTS.* There, a father having received a disposition to himself, his heirs and assignees, with a precept of sasine ; and having afterwards taken a charter from the superior, who was

No 17. also the disponent of the lands, to himself in liferent, and his son in fee, thought proper to bring a reduction of the same, as being granted without any warrant. But it having been *urged* for the son, That in the sasine, the father was said to have received the symbols of infeftment as attorney for his son, and that in a bond granted by the father, the son was designed by the lands contained in the charter, the Lords found, That the charter and sasine, without any warrant, joined with the circumstances above-mentioned, were sufficient to establish the fee in the son.

Replied for the defender. To the *first* ; The Earl of Traquair, who granted the erroneous charter, was the only person who could properly be called in the reduction. For James Williamson having died without issue, the defender was his immediate representative ; but he had, before that time, renounced to be heir to him, in the pursuer's process of constitution.

To the *second* ; *Resoluto jure dantis, resolvitur jus accipientis*. James Williamson could communicate no better right to another than he had himself. And the case of Phisgil is by no means applicable to the present. Phisgil was not only infeft, but in the unchallenged possession of the estate ; when his lady was infeft in security of her jointure, she contracted upon the faith of his being proprietor of the estate of which she saw him possessed ; and her infeftment created a real lien upon the lands for the most onerous cause. On the other hand, James Williamson never was in the possession, and the pursuer received no infeftment or real security from him. He was only a personal creditor ; and his adjudication of the lands, as *in hereditate jacente* of James, could give him no right to them, in the event of its appearing that James had no interest in them himself.

To the *third* ; The disposition by Cardrona was granted to John Williamson, and the heirs-male of his body, without mention of liferent or fee in the one or the other ; and no instance can be given, where such a grant was ever found to devise the fee to the issue of the disponent, and only the liferent to himself.

To the *fourth* ; The clause of *novodamus* is an intrinsic nullity of the right, as being altogether without warrant. A superior may, indeed, enlarge the right of the vassal by a new grant ; but it never has, hitherto, been alleged, that by an arbitrary act, he could deprive his vassal of what was formerly conferred upon him, and transfer it to another. Supposing that resignation had been made by Cardrona, in the terms of his disposition, it could not be maintained, that the superior could have given the new investiture in different terms. But here the case is still stronger ; for no resignation was made at all ; and the superior took it upon him to give away the property of lands over which he had no power, the fee being full at the time.

To the *fifth* ; In the *first* place. There is no legal evidence of any homologation on the part of the father. His acceptance of the charter is no otherwise instructed than by the instrument of sasine, which bears his receiving infeftment for himself and son. But this is only the assertion of a notary ; and the inconveniencies would be great, if the bare attestations of notaries, produced

at distant periods, were to be conclusive as to the interest of parties in land-rights. Besides, it is not denied, that the father, from the date of the charter down to his son's death, acted not as a naked liferenter, but as absolute fiar of the subject; which shows, that he did not consider it as giving more than a *spes successionis*; and he no sooner discovered the contrary, than he gave the strongest testimony of his repudiating these erroneous rights, by taking a new infeftment on the precept in Cardrona's disposition, and obtaining a decret of reduction of the charter and sasine.

In the *next* place, even supposing the father's acceptance of the charter fully instructed, no right could thereby be vested either in his or his son's person.—The fee at that time was completely established in Cardrona. He had indeed granted a procuratory and a precept. The procuratory, however, never was executed; consequently Lord Traquair could grant no charter of resignation, nor convey the fee to any person whatever by a clause of *novodamus*. Again, no infeftment had been taken upon the precept; so the charter of confirmation was premature and inept. But, even supposing infeftment had at that time been taken in virtue of the precept, the confirmation would be warranted no farther, than in so far as it was agreeable to the precise terms of such infeftment; and, as it deviated from Cardrona's disposition, by giving the fee to the son in place of the father, it was *ultra vires* of the superior; and therefore void and null.

Lastly, The case of Cubbison will by no means apply. For, *1mo*, In that case, the real right of the lands was truly in the superior's person at the time of granting the charter. *2do*, The circumstance of the bond shewed the father's homologation of it in a strong manner. And, *3tio*, The presumption arising from the notary's assertion, was confirmed into the most positive evidence, by the father's admission of the fact.

‘THE LORDS sustained the defence, and assoilzied from the mails and duties.’

Reporter, *Justice-Clerk*.

Act. *Macintosh*.

Alt. *Ræ*.

Fol. Dic. v. 3. p. 162. Fac. Col. No 258. p. 477.

S E C T. V.

Competition among Rights Confirmed.

No 18.

In a case of double alienation of lands, the first being to a bride, *secundum tenorem chartæ conficiendæ*, the last, though posterior, having obtained the first confirmation from the superior, the Lords preferred the same, and found that the date of the other confirmation could not be drawn back to the date of the alienation.

1580. July 13.

LADY POLMAISE *against* TENANTS.

THE Lady Polmaise Murray wairnit certain tenants to flit and remove fra certain lands. It was *alleged* be the tenants, That they aught not to flit; because, before the wairning, they were infeft and seased in the lands, and be virtue thereof were in possession of the same. To this was *answered*, That, notwithstanding of their infeftment, they aught to flit and remove; because she, before their infeftments, was seased in the lands be her husband in the time of her virginity *et e contemplatione futuri matrimonii*, and thereafter obtained confirmation of the same; and so her husband denuded himself, first by seasing of her in the land, *secundum tenorem chartæ conficiendæ*, had no power thereafter to infeft or sease the defenders in the said lands. To this was *answered*, That albeit she was seased before the defenders were seased, yet their exception ought to be admitted be reason of the act of Parliament made in King James the Fifth's time, anent double alienation, that where there are double alienations made to sundry persons of one land, that he that gets the last alienation *titulo oneroso*, with the first receiving of the superior, either by resignation or confirmation, and possession following thereupon, shall prevail over the first private alienation, albeit it have the priority. To this was yet *answered* be Polmaise, That her sasine that was first was not private, because it was afterwards confirmed be the superior, and she obtained infeftment conform to her sasine; whilk infeftment and confirmation aught to be drawn back to the time of her sasine, because the same was given *secundum tenorem chartæ conficiendæ*. To this was *answered*, That it could not be drawn back, *quia obstabat interim medius obex*, whilk was the sasine and infeftment given to the defenders, and it was before the Lady's infeftments confirming.—THE LORDS admitted the exception of the defenders, and that in respect of the act of Parliament, and repelled the allegiance made be the Lady.

Fol. Dic. v. 1. p. 194. Colvil, MS. p. 287.

No 19.

An infeftment for re-

1611. January 25.

GRAY *against* PITFERRAN.

THE Laird of Parbroath, in anno 1608, disposed heritably the lands Gillets, &c. to be holden of the Queen. Shortly thereafter Parbroath, by contract,

bound himself to infest Pitferran in the saids lands, for his surety and relief of 3300 merks, for the which he was cautioner for Parbroath to Bogie, conform to a contract passed betwixt them thereanent; and that Pitferran would have full right and possession of the said lands at the feast of Whitsunday 1609, in case he was not relieved of his contract and cautionry before that said term; and should thereafter bruik and possess the lands, ay and while he was relieved by payment to Bogie. Which contract, betwixt Parbroath and Pitferran, contained a precept of sasine of the said lands to be holden feu of the Queen, whereupon Pitferran took sasine of the lands, and obtained his contract and sasine confirmed by the Queen in *anno* 1608 or 1609. At Whitsunday 1609, Pitferran being charged with horning by Bogie, and not relieved by Parbroath, was forced to satisfy Bogie by new security. And, at Whitsunday 1610, Pitferran is relieved by payment to him of the principal sum; and, in that same year 1610, Robert Gray's infestment of the Gillets is confirmed by the Queen; and, because Pitferran paying Bogie at Whitsunday 1609, and not being relieved till Whitsunday 1610, a question arises in a double pointing, raised by the tenants against Pitferran and Robert Gray, both pretending right to the farms *anno* 1609. Robert Gray *alleged* he should be preferred, because he was infest and in possession, and that Pitferran could have no right, his infestment being only an infestment of warrandice depending upon a distress, and not relief, whereupon no declarator was obtained thereupon; next, Robert Gray's sasine was anterior to his adversary's. It was *answered*, That his infestment, which was conditional in the beginning, was purified and made absolute by the failzie committed by Parbroath in not relieving of him at Whitsunday 1609, at which time his infestment became prior and perfect. And albeit Robert Gray's sasine was anterior to his, yet both their infestments being granted to be holden of the superior, and Pitferran's, being first confirmed, was most perfect, and that no impediment stayed that Robert Gray's confirmation could not be drawn back to his sasine. At last, Robert *alleged*, that Pitferran could pretend no farther interest but his not relieving of the sum for a year, seeing he was relieved at Whitsunday 1610 of the sum which should have been paid at Whitsunday 1609, and so his interest being only the profit of 3300 merks for one year, he was content to refund to him the said interest *cum omni causa*. Pitferran *answered*, That his infestment not being an annualrent, but proper wadset of the lands, he would not alter his security and enter in paction. In respect whereof, the Lords found Pitferran's allegiance relevant. Thereafter Robert Gray *alleged*, That Pitferran could have no right, because albeit he was not relieved at the day appointed, yet he was not distressed, at least he had not made payment for his own relief and Parbroath's. Pitferran *answered*, and offered to prove, That he, being charged by Bogie, was forced to make him new security, and took an assignation to his brother. It was *replied*, That the assignation kept the debt above Parbroath's head, and so he was not relieved, and consequently Pitferran could

No 19.
lief of cautionry becomes perfect, if the failzie be committed, and it being first confirmed, it will prevail against an anterior infestment confirmed thereafter.

No 19. not claim his infeftment. Notwithstanding whereof the LORDS sustained Pitferran's allegiance, he reporting a sufficient discharge from Bogie, and from Pitferran's brother to Parbroath.

Fol. Dic. v. 1. p. 194. Haddington, MS. No 2124.

1678. December 6. MILN against The LAIRD of POWFOULS.

No 20.

In a competition betwixt two infeftments, the first confirmation was preferred, and the bare giving in of a signature to the exchequer was found not sufficient, unless all diligence had been used by the one, or precipitation by the other.

IN a competition betwixt the Creditors of Clackmannan, Alexander Miln and Powfouls, upon two base infeftments, were the same day and hour infest in Clackmannan's estate; the said Alexander for an annualrent of a sum due to him, and Powfouls, for relief of several sums in which he had been cautioner for Clackmannan; both infeftments to be held of and from Clackmannan. Both gave in signatures to the Exchequer in one day for confirmation, but Alexander Miln's signature was first past in Exchequer, and his confirmation first past the seals. Alexander did also, before either confirmation, obtain a decret of poinding of the ground; whereupon they compete for preference. Powfouls *alleged*, That his infeftment, being for relief, was valid from its date, there being no ground of simulation, but the infeftment astructed by anterior bonds to other creditors, wherein Powfouls is cautioner; and, therefore, by the act of Parliament, such infeftments, though base, are never to be postponed to any infeftments, not being prior, but are in the same case as infeftments of warrandice; both which cannot attain possession till distress, but from distress have effect from their date. *2do*, As to the confirmations, the Exchequer, by act of Parliament, is ordained to give confirmations to all parties, as they demand the same; so that Powfouls having presented a signature of confirmation as soon as Alexander Miln, the gratification of Exchequer, in passing Alexander Miln's first, cannot prejudice him. It was *answered*, That public infeftments are always preferred to base infeftments before possession, or diligence for the base infeftment first attaining possession; and, though custom hath accepted infeftments of warrandice, where possession is had of the principal lands, it hath not extended the same to infeftments for relief of personal debts, which would much unsecure purchasers. And as to the confirmations, the giving in of a signature, without continuing to get the same past, imports nothing. *2do*, Though the King, as superior by the common law, must receive apprisers or adjudgers, yet as to infeftments upon resignation or confirmation, the King, as all other superiors, may refuse all or confirm whom he pleases. And, by the act of Parliament founded on, viz. act 66. Parl. 5. 1578, The first confirmation is declared the best right. And albeit that act mention an act of Council, yet the King or his compositors ought not to deny confirmation upon the reasonable expenses

of any party, yet that is not repeated in the statutory part, but only in the narrative ; and an act of Council can derogate from no man's right, much less the King's.

No 20.

THE LORDS found the giving in of a signature could not bring in that patty, without first obtaining a confirmation, unless all diligence had been used by the one, or precipitation by the other ; but did not determine that point, whether the Exchequer was obliged to confirm according to diligence, and did resolve further to hear that point, whether infestments for relief of personal debts were valid from their dates.

Fol. Dic. v. 1. p. 194. Stair, v. 2. p. 653.

1680. February 26. Laird of CLACKMANNAN against The EARL of WIGTON.

BRUCE of Newton having infest Clackmannan for relief of his cautionries for several of Newton's creditors, and having thereafter infest the Earl of Wigton, for his relief as cautioner to other creditors, both infestments are confirmed by signatures past at the same time, whereupon both do now compete. It was *alleged* for the creditors, to whom Clackmannan was cautioner, That his infestment ought to be preferred, because his base infestment is prior, his signature of confirmation is *simul*, and it is first past the seal by a month's space, as it appears by the attest of the keeper of the seals to the charter, as use is. It was *answered* for Wigton, That both infestments being base, without possession, the confirmation only, by which they become public, makes them effectual rights, so that both their confirmations, past of the same date, must come in *pari passu*; and no respect ought to be had to the attest by the keeper of the seal, otherwise it should be in his power to prefer and postpone as he pleases, for which he hath no commission ; and though his oath was taken, he is but one witness. It was *replied*, That the seal only perfects the confirmation, and is in place of the King's subscription ; and albeit the dates be insert in charters, according as the signatures pass, yet it is not the signature that gives the right, otherwise no infestment by confirmation could be known or secured, but a naked signature would be preferred to a posterior sealed charter. Neither is there any hazard of the collusion of the keeper of the seal ; because, when a signature passeth the seals, it is to be found recorded at the Privy and Great Seals in the Chancellery, and there is a minute kept of all the sealings of charters.

No 21.

The confirmation first expedie thro' the seals was found preferable, though the date of the charters was the same.

THE LORDS found the first expedie confirmation through the seals preferable, although the date of the charters were the same ; and that the attest of the sealer was sufficient, unless it were controuled by the registers, or that the other party had craved to pass his signature as soon, and taken instruments upon the refusal, and collusion of the keeper of the registers and seals.

Fol. Dic. v. 1. p. 194. Stair, v. 2. p. 765.

1682. *March.*The LORD CARDROSS *against* GENERAL DALZELL and Others.

No 22.

In a competition among creditors, on a bankrupt estate, it was found, that a confirmation having first passed the seals, was preferable to another confirmation, though it was long before past in Exchequer.

THE tenants of the estate of Kincardine having raised a multiplepinding against the creditors, it was *alleged* for my Lord Cardross, That he ought to be preferred, he having infest upon a bond of relief, granted to him by the Earl of Kincardine, for considerable sums of money, wherein he stood engaged as cautioner for him.—*Answered* for Lieutenant General Dalzell, who likewise stood infest in the lands, in an yearly annualrent effeiring to the sum of 15,750 merks, due to him by the Earl, That he ought to be preferred, because the Lord Cardross's sasine was null, it being taken at certain places in the lands by dispensation; for albeit the Earl's charter under the Great Seal bear a dispensation as to the lands, yet that benefit is not communicable to singular successors by base infestments, but the parties ought to be infest in every land, as if no such dispensation had been granted; and albeit the Lord Cardross, his first sasine, be confirmed by the superior, yet it is null, seeing it is not registered; and the last sasine taken upon the same bond, which is long after the confirmation, is posterior to General Dalzell's sasine, and decret of pinding the ground thereupon, which makes his right public, as also, it being declared by the bond of relief, that it was not to take effect before distress; but so it is, that General Dalzell's right being made public before the Lord Cardross was distress, it was *medium impedimentum*, and the distress could not be drawn back to his prejudice.—*Replied*, That the dispensation contained in the Earl's charter, being under the Great Seal, as he may convey and communicate the right of property of the lands to singular successors by base infestments, so he may convey and communicate the benefit of the dispensation; and albeit the Lord Cardross's first sasine be not registered, yet the last sasine is a sufficient ground of preference as to General Dalzell; because the confirmation by the superior confirms not only the sasine already taken, but all sasines to follow thereupon; so that the last sasine being taken before General Dalzell's sasine was made public by a decret of pinding the ground, whenever the sasine is taken it is drawn back to the date of the confirmation, and so must prefer him to General Dalzell.—*Alleged* for Robert Colvil writer, That he ought to be preferred to the Lord Cardross by virtue of his adjudication, which is long prior to the Lord Cardross's infestment upon his bond of relief, and he likewise used diligence to obtain himself infest upon the adjudication before the Lord Cardross's infestment, having presented a signature to the Exchequer, albeit the expeding thereof was stopt by other creditors, which ought not to prejudge him; especially it being provided by the act of Parliament anent adjudications, that the adjudger shall be in the same case after citation as if an apprising were led of the lands at that time, and a charge given to the superior thereupon; and therefore, as a comprising without a charge against the superior would have been preferred to the Lord

Cardross's posterior infeftment, by that same reason Robert Colvil ought to be preferred by virtue of his adjudication, seeing he did diligence to obtain himself infeft before the Lord Cardross's infeftment; and not only had he obtained an adjudication and done diligence for obtaining infeftment, but the citation upon the adjudication was prior to the bond of relief granted to the Lord Cardross; and as to the act of Parliament 1621, the common debtor could do no voluntary deed after the denunciation upon a comprising, so as to prefer one creditor to another; so by the same reason the Earl of Kincardine could grant no bond of relief to the Lord Cardross in prejudice of Robert Colvil, after citation upon the adjudication; and albeit the bond of relief was granted for antecedent causes of debt before the citation, yet the same cannot be respected, unless there was an antecedent express obligation to infeft for security of these debts; seeing citation upon a summons of adjudication is equivalent to of lands to be appraised after, where it has been found in many decisions, that the common debtor could not prefer one creditor to another.—*Answered* for the Lord Cardross, Adjudication being but a personal right, and he having the first real right, he ought to be preferred, especially his bond of relief being prior to Colvil's adjudication, and being for debts long prior to the adjudication; and the act of Parliament anent adjudications, declaring the adjudger to be in the same case after citation as if a comprising were led and a charge given thereupon, is only in relation to the superior, and the casualties belonging to him, seeing the act declared, that the superior and adjudger are declared to be in the same case, but determines nothing as to third parties in the same condition they were in before the case of appraisings; and it was just that the superior should have been in the same case; and if there had been a charge given, in so far as concerns his casualties, because he was cited upon the summons of adjudication; and Colvil could not be preferred upon the account that his signature was stopt before the Exchequer, seeing the Lords of Exchequer may stop or pass a signature upon such reason as they shall think fit, and many times upon competition, they will prefer those whom in justice they think ought to be preferred.—*Alleged* for Cornelius Vanaersan, the Earl of Kincardine, his brother-in-law, That he ought to be preferred upon a bond of relief, granted to him for the sum of 12,000 guilders, for which he stood engaged as cautioner for the Earl to Mr Willars, he being infeft, and his infeftment clad with possession by receiving payment of several years annualrent, as appears by the discharges, before the Lord Cardross's right.—*Answered* for the Lord Cardross and the other creditors, that the discharges being holograph, do not prove as to the date, and so cannot clothe the base infeftment with possession.—*Replied*, That base infeftments of relief are valid without possession, as in the case of infeftments of warrandice the principal parties possession being their possession before distress; and this was expressly decided in February last, in the case of Bruce against Clackmannan, No 55. p. 1332. where the Lords found that Bruce of Newton's base infeftment of relief was preferred to a posterior public infeft-

No 22.

ment, albeit the base infeftment was clad with possession; and Newton was not preferred upon that consideration, that immediately after his base infeftment, he presented his signature of confirmation to the Exchequer, and was refused; seeing the Exchequer was not obliged to have past the signature, his Majesty being in the same case as other superiors, who cannot be compelled to receive vassals and grant infeftments upon voluntary rights without a legal diligence, but the *ratio decidendi* in that case, as appears by the interlocutor, was, that it is a complete right *in suo genere*; and albeit the discharges be holograph, yet they do sufficiently prove, seeing by the custom of Holland, where they were signed, such writs are probative without witnesses.—*Duplied*, That it is a certain principle in law, that a public infeftment is always preferable to a prior base infeftment not clad with possession, which is founded on that act of Parliament of King James the V. relating thereto, and there is no speciality in the case of base infeftments of relief, *et non est distinguendum ubi lex non distinguit*, and there was more hazard, and a greater prejudice, to sustain such base infeftments of relief than others; because they being private and latent deeds, they may be granted by a debtor to his friends for their relief, in defraud of all other creditors; and albeit such infeftments do not take effect till distress, yet the party has a remedy in law; for he may either obtain a confirmation thereupon from the superior, or may take a decret thereupon *declaratorie juris*, to take effect when distress; and in the case of Bruce of Newton, his main ground of preference was his diligence in obtaining the signature of confirmation to be past by the Exchequer; and as to the discharges, albeit such discharges are valid by the law of Holland, yet they cannot prove as to the date, unless otherwise instructed, to make an heritable right in Scotland preferable, seeing such rights must be ruled by the law of Scotland.—*Alleged* for the Lady Kincardine and her children, who stand infeft in an yearly annualrent to the principal sum of 50,000 merks, That she ought to be preferred to the Lord Cardross, her infeftment being prior and clad with possession before the Lord Cardross's right.—*Answered*, That the decret of poinding of the ground by which the Lady pretends her right was clothed with possession, being before the Bailie of the regality of Torrieburn, can only make the right public as to the lands lying within that regality, and not as to other lands which lie not within that jurisdiction.—*Replied*, That albeit the decret of poinding the ground doth not only make the infeftment public as to the lands lying within the regality of Torrieburn, but even as to other lands, being *in eodem corpore juris*; and as the receiving payment from the tenants of a part of the lands, would make the infeftment public as to the whole, so the decret of poinding the ground, which is valid against a part of the lands, must make the right public as to the hail lands that are contained in the same right; and it was so decided in Ker against Ker, No 60. p. 1338. where an infeftment of annualrent for two several sums, one for borrowed money, and another for a portion natural, the Lords found the receiving of the annualrent, for the sum of borrowed money, did make the

infestment public as to the hail, albeit the portion natural did not bear annual-rent while after the father's decease; and that in respect both the sums being *in eodem corpore juris*, could not be divided.—*Alleged* further for the Lady Kincardine, That she ought to be preferred not only for 80,000 guilders due to herself, by her contract of marriage, for which she stands infest in the hail estate, but also for L. 3000 of aliment, modified by the Lords for maintaining of the family for the space of three months, from the time of the late Earl's decease to the next term thereafter.—*Answered* for the Creditors, That the late Earl being denuded of his estate by virtue of adjudications and infestments of annual-rent before his decease, the said aliment cannot be allowed, nor can affect the heritable estate, but ought to be paid out of the moveables intromitted with by the Lady, by virtue of her husband's escheat and otherwise, which are of a considerable value.—THE LORDS found, That Cornelius Somerdyke, his infestment of relief, albeit base, was preferable to the posterior public infestments, and that General Dalzell's confirmation having first past the seals, was preferable to the Lord Cardross's confirmation, albeit it was long before past in Exchequer.

Fol. Dic. v. 1. p. 194. Sir P. Home, MS. v. 1. No 197. p. 282.

1691. July 8.

LORD SINCLAIR *against* CREDITORS OF LANGTON.

No 23.

MY LORD SINCLAIR having presented a signature of confirmation of a right of relief (after he was distressed by a bare registration without a charge,) to the Exchequer, and taken instruments thereon, was brought in *pari passu* with those whose confirmations were past that same day his was presented; it being presumed, that if my Lord's had first past in the Exchequer, he would have got it sealed as soon as Carnwath's. A bill being given in against this interlocutor, as contrary to a former in the same cause the preceding session, the LORDS adhered, except as to the lands holding ward; 2do, Found, that a citation in a mails and duties, prior to a confirmation in Exchequer, was no cloathing of the the base right of relief; but answer was delayed as to the effect of a second citation, if it cloathed like a citation in a poinding of the ground, or if not, till decret or possession followed.

Fol. Dic. v. 1. p. 194. Harcarse, (INFESTMENT.) No 623. p. 172.

Confirmation operates a discharge of the superior's casualities. *See IMPLIED DISCHARGE.*

Confirmation makes not a base infestment public. *See BASE INFESTMENT.*

Deeds that have the force of a confirmation. *See VIRTUAL, Confirmation.*

Confirmation of Testaments. *See SERVICE and CONFIRMATION.*

See Justice-Clerk against Coldingham, No 35. p. 1753.

See SUPERIOR and VASSAL.—INFESTMENT.—APPENDIX.

CONFUSIO.

1610. July 20. JOHNSTON *against* IRELAND.

No 1.

HE who had sums of money to crave of a defunct, falling heir to him, may not the less pursue the defunct's executors for that debt, which is not confirmed nor taken away by the creditor's becoming heir to his debtor.

Fol. Dic. v. I. p. 195. Haddington, MS. v. 2. No 1978.

1630. March 18. DR HAIRT *against* PATRICK his Brother.

No 2.

If a creditor fall to be executor to the debtor, there can be no action at the creditor's instance against the heir for that debt; because both creditor and defender are confounded in one person.

Fol. Dic. v. I. p. 195. Auchinleck, MS. p. 75.

1630. March 18. DALGARNO *against* FORBES of Byth.

No 3.

AN executor may not take an assignation to the defunct's debts, and make assignation thereof to another person, to the effect the assignee may pursue the heir; for the debt being confounded in the person of the executor, who should have paid the same, he might not assign the same to another.

Fol. Dic. v. I. p. 195. Auchinleck, MS. p. 75.

* * * Durie reports the same case :

A WOMAN being made assignee by her own son Patrick Dalgarno, to certain debts addebted by umquhile Forbes of Byth, her own son also by another marriage, to divers his creditors, which creditors had made the said Patrick Dalgarno her cedent, assignee thereto; and she pursuing registration of these bonds against the heir of the said umquhile Forbes of Byth debtor thereof, wherein the defender compearing, this defence was found relevant by the Lords, to stop the registration against the heir of the defunct, at the instance of this assignee constitute by the son, who was made assignee by the creditors, because it was offered to be proven, that the assignee Dalgarno was executor decerned to the defunct debtor; which defunct's testament being confirmed, the

- No 3. free gear thereof amounted to greater sums than would satisfy the foresaid debts, whereto he was assigned by the creditors; and he being executor, and the testament containing more free gear than would satisfy the debts acclaimed, and being confirmed, and he decerned executor before the acquiring of the assignation from the creditors; the said assignation made by them to him, must of necessity be converted for the weil of the defunct's heir, whom in law the executor is obliged to relieve of the defunct's debt, so far as the free gear of the testament extends to; and no other assignation can be made by him to any other assignee, which might prejudice the heir of that relief, which the pursuer's cedent, being executor, was obliged to give him of the defunct's debt, by the defunct's moveables. This allegiance was found relevant against this pursuer, albeit she *answered*, that she was a singular successor, and that her cedent was answerable, and had found caution in the testament, and the defender might convene him for any thing wherein he was obliged in law, for which this pursuer could not be liable; for he might allege, that the free gear was otherways exhausted, or that after diligence, the gear of the testament was not recoverable, which she could not know, and was not competent to her to allege; notwithstanding whereof the allegiance was found relevant to meet this assignee, as it would have met the executor, who was cedent, and the first assignee constitute as said is.

Act. *Baird.*Alt. *Lermontb.*Clerk, *Gibson.**Durie, p. 508.*

- No 4. 1662. *July 10.* KER against KER.

AN apparent heir having purchased in an adjudication of his predecessor's estate, led upon the apparent heir's own bond, brought a process upon that title against some havers, for exhibition of the rights and evidents of the lands, and delivery thereof; the defender *alleged* absolvitor, because the adjudication was extinguished *confusione*, which was repelled.

Fel. Dic. v. 1. p. 195.

. See The particulars of this case, *voce* COMPETENT, No 8. p. 2701.

1664. *December 22.* CALDERWOOD against PRINGLE.

No 5.
An obligation
in a tailzie,
prestable by
heirs-male, is

THE deceast John Pringle of Cortleferry, by his contract of marriage with Alison Pringle his spouse, in *anno* 1632, obliged him to resign his lands in favours of himself and his spouse, and the heirs to be gotten betwixt them; whilk

failzieing, his own heirs whatsoever. The said John being dead without heirs of the marriage of his body, and his lands, by the old infeftment, being tailzied to the heirs-male, James Pringle of Willanlaw has obtained himself infeft therein as nearest heir-male; and John Inglis of Mannorhead, and Marion Pringle, being heirs of line to him, and they having assigned their rights in favours of James Calderwood, he pursues the heirs-male for fulfilling the obligations in the contract in favours of the heirs of line. It was *alleged*, The obligations being made by the defunct, and the pursuit being at the instance of the heirs of line their assignee, and to their own behoof, *debitum* and *creditum* is confounded; and though it were not confounded, but that the heirs-male might be thought liable to the heirs of line, yet not in this case; because the old tailzie of the lands was constituted by infeftment granted by the superior, which cannot be taken away by any such naked obligation, unless infeftment had followed thereupon from the superior; because infeftments of tailzie, as they are constitute, must that same way be dissolved by an infeftment from the superior. Likeas, to clear that it was not the defunct's mind to alter the tailzie, that he did live many years after the contract, and did nothing thereupon in favours of his heirs of line, and which contract was made for the use of the wife in liferent, and the heirs of the marriage; and whereas, heirs whatsoever were substitute, failing heirs of the marriage, his meaning has clearly been of heirs whatsoever contained in his old infeftment, which were heirs-male whatsoever. Likeas, it was *alleged*, That, by the old infeftment granted by the superior, it was provided, that the tailzie should not be altered without consent of the superior. It was *answered*, That where an obligation is only performed by an heir-male, especially in favours of the heir of line, there can be no confusion, the heir-male being proper debtor, and the heir of line creditor. And the question is not here, how a tailzie should be perfectly constitute or dissolved, which no doubt must be by infeftment from the superior; but here the question is upon an obligation for perfecting a tailzie, viz. for resigning in the superior's hands; which obligation the defunct's heir-male is obliged to perform to the pursuer, who will take his own way with the superior; and though there were such a clause in the old infeftment, that the tailzie should not be altered without the superior's consent, which is denied, yet that takes not away the force of the obligation against the heir-male; but that he ought to resign in favours of the pursuer, who will take his hazard of the superior, in whose favours that condition is conceived.

THE LORDS, before answer, ordained the old charter of tailzie to be produced, that they may consider how it was conceived; which they did, conceiving the case to be favourable for the heir-male, in respect nothing had followed upon the contract in the defunct's time; and yet their judgment was, that the obligation could not be made void, but behoved to be fulfilled, unless something more did appear from the old tailzie.

No 5.
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guished *confu-*
sione, altho'
the benefit
may even-
tually accrue
to heirs of
line.

Gilmour, No 121. p. 88.

1680. December 21.

LADY MARGARET CUNINGHAME *against* The LADY CARDROSS.

No 6.

A gentleman having disposed the bulk of his estate to his second son, and certain heirs of tailzie, with the burden of relieving the heir of line of the debts; and, after the eldest son's death without issue, the second son being served heir both of line and provision, the obligation for relief was found not extinguished in his person, though he was both heir and creditor in the said relief, and therefore his heir of line, who was also heir of line to the maker of the tailzie, was found to have relief against the heirs of provision, so as to have the unentailed estate disburdened of all debts.

SIR JAMES STUART of Kirkhill disposed the bulk of his estate to William Stuart his second son, (his eldest son being a weak person) and to William's heir-male of his body, which failing, 'To Catharine Stuart, his younger daughter, and her heirs;' the disposition contains this clause, 'That the said William and his heirs of tailzie shall be obliged to pay Sir James's whole debts, and perform his whole deeds and obligations in the same way as if William were his heir, or as Sir James would be obliged himself;' about the time that this deposition was signed, Sir James's eldest son died, and his son Sir William became infeft upon this disposition, and there being some wadsets not contained in the tailzie, Sir William was infeft in these, 'as heir to his father,' for they were disposed to him and his heirs whatsoever; Sir William died without heirs of his body, and thereby his succession divided, the tailzie descending to Catharine, now Lady Cardross his youngest sister, as heir of tailzie; and the untailzied estate fell equally to the Lady Cardross, and to Lady Margaret Cuninghame, only daughter of his eldest sister; Lady Margaret and her husband, Sir John Maitland, pursue a declarator against the Lady Cardross and the Lord Cardross her husband, to hear and see it found and declared, that Lady Margaret had right to the half of the untailzied estate, and that the Lady Cardross, as heir of tailzie to Sir William, was obliged to pay Sir James's debts by the foresaid clauses in the tailzie, and to relieve the pursuer as heir of line thereof. It was *alleged* for the defender, That this clause contained nothing of relief, but was only to show that Sir James intended not by this disposition to defraud his creditors, to whom he was, or should become debtor, and therefore obliged his son and heirs of tailzie to pay his debt, which could only be understood according to the order of discussion allowed by law, after his executors and heirs of line were discust. It was *answered*, That Sir James's disposition, bearing expressly, 'to Sir William his second son,' with an obligation 'to pay his debt,' could be no otherways intended or interpret, than that the little remainder reserved out of the tailzie, should be reserved for his eldest son, who otherways had no provision or aliment, and so being conceived in general terms, 'That Sir William's heir of tailzie should relieve Sir James's heir of line,' the clause behoved to have the same effect as to this pursuer, as heir of line, as it would have had to Sir James's eldest son, if he had lived; 'THE LORDS did formerly find, That the foresaid clause did import a relief to Sir James's heir of line, that the heirs of tailzie behoved to pay Sir James's debt, without discussing or recurring upon the heir of line.' It was now further *alleged*, That this pursuer could claim no relief as heir of line to Sir James, because she was now entered heir of line to Sir William, who was only heir of line to Sir James, and therefore was liable to all Sir William's debt, which comprehended not only the debts contracted by Sir William, but all Sir James's

debts did become Sir William's debts, by entering his heir, and the pursuer being Sir William's heir of line is simply liable for all Sir William's debts, whatever way he was obliged, and can seek relief of none of them from Sir William's heir of tailzie by this clause, because the clause did oblige Sir William 'and his heirs of tailzie to pay Sir James's debt;' and albeit the clause had born expressly, 'to relieve Sir James's heir of line;' yet Sir William being actually served heir of line to Sir James, he became both debtor and creditor on the relief, *et confusione tollitur obligatio*, for confusion is an unquestionable peremptory defence, as effectual as payment, or compensation. 2do, The pursuer neither is, nor can be heir of line to Sir James, seeing Sir William was entered heir of line to Sir James, and the whole estate tailzied and untailzied was once settled in the person of Sir William; so that the pursuer being Sir William's heir of line, must be liable to all debts whereunto Sir William was liable, as contracted by himself, or representing his father, and cannot be said to be Sir James's heir of line. It was *replied* for the pursuer, That albeit she be immediate heir of line to Sir William, yet she is immediate heir to Sir James, and would be liable to all Sir James's debts, although they had never been established against Sir William; and it is acknowledged, that *quoad* the creditors, they have full access against the heir of line, and of tailzie of Sir William. But all the question is, whether Sir James's heir of line succeeding both to him and Sir William, hath the benefit of the clause in the tailzie, importing relief, which cannot be denied, seeing it is evident that Sir James did settle a part of his estate tailzied; and a part untailzied, that he did design to keep the untailzied estate without burden, whensoever the succession should divide betwixt the heirs of tailzie and of line. And as to the pretence of confusion, though it was an absolute peremptory defence before the feudal law, when *additio hereditatis* was *actus legitimus nec exsiciens diem nec conditionem*; but now the feudal customs having introduced so many kinds of succession, which may be qualified with all imaginable qualifications, the confusion that was then perpetual, is frequently now but temporal, during that time that only one person is both heir of line and tailzie; so that such clauses must be interpreted according to the rational design and meaning of parties, to take effect at the first time the estate shall happen to divide betwixt the heirs of line and heirs of tailzie; so that Sir James knowing clearly that this clause could never take effect during his son's life, in whose person his estate tailzied and untailzied was established, his eldest son being dead about the time he subscribed the disposition, his design could be no other, but so soon as his estate should divide betwixt his heirs of tailzie and of line, the heir of tailzie should pay his debt, without burdening the heir of line.

THE LORDS found, that the pursuer as being both heir to Sir William, and by him to Sir James had right to crave relief off the Lady Cardross, as heir of tailzie, the succession being now first divided betwixt the Lady Cardross as heir of tailzie, and the pursuer and the Lady Cardross as heirs portioners and of line.

No 6.

and that the concurrence of both estates in the person of Sir William, did not absolutely extinguish the obligation of relief, but only during the time that the estate was in one person.

Fol. Dic. v. 1. p. 195. Stair, v. 2. p. 821.

No 7.

Though an apprising during the legal, purchased in by the heir served, becomes there-by extinct *confusione*, it is not the same, where it is purchased in by the heir having a disposition of the appraised lands, though thereby liable to the debt appraised for *præceptione hereditatis*, because *præceptio hereditatis* is not an universal passive title, nor does the heir thereby become *eadem persona cum defuncto*.

1693. January 25. BURNET of Carlips *against* NASMITH of Posso.

THE LORDS found that a backbond (though personal) affected a comprising even against a singular successor, during the currency of the legal, being but a collateral security; and that though the 10 years were elapsed since Posso acquired in these rights upon his father's estate, whereof he was apparent heir, yet, that the said 10 years were interrupted by the extract of the summons at Carlips' instance against him, taken from the signet, and by the decision 19th June 1668, marked by Stair; which the Lords found equal to an execution, though now lost; the Lords judging these acquisitions often fraudulent and unfavourable, viz. Burnet against Nasmith, *voce* HEIR APPARENT.

1693. November 8.—ON a bill given in by James Nasmith of Posso against Burnet of Carlips; it occurred to the Lords, to reconsider their former interlocutor given in this cause, that though a back-bond will affect the granter, yet how far it meets his singular successor, not by a voluntary disposition, but by a legal diligence of apprising or adjudication from him, even after it is perfected by infeftment; the LORDS resolved to hear it farther as a weighty and material point. See Stair's Institutions, b. 3. tit. 1. § 21. and the two decisions there cited in 1676; viz. Brown against Smith, No 76. p. 2844.; and Gordon against Chein, *voce* PERSONAL and REAL; and 10th March 1629, Shaw *contra* Kinross, *voce* PERSONAL and REAL.

1693. December 28.—THE LORDS advised the tedious and intricate debate between Burnet of Carlips and James Nasmith of Posso; and as to the *first* point, they were all clear that a back-bond granted by an appriser, militated not only against himself, but also against his singular successors, in two cases; if either the apprising was *in cursu* and not expired, or if the apprising stood *in nudis terminis* of a personal right, and no infeftment taken upon it. But the question here occurred, that the back-bond was given by Sir Michael after the apprising acquired by him was expired; and though there was no infeftment upon it, at the time when he subscribed the back-bond, yet shortly thereafter infeftment followed, and whether from that time downwards the back-bond could meet, or affect singular successors? For it was acknowledged, that, in heritable voluntary dispositions, such a back-bond given by the disposer, would not meet the receiver of the disposition, and that there was the same parity for an expired apprising, because then it was no more *pignus legale* for security of the money, but the appriser turns proprietor: But it was *alleged*, there was a dif-

ference, seeing a discharge by an appriser, intromission with the mails and duties, a renunciation, or any other declaration of his will meet his assignee, but not so in a disposition: Whereupon the LORDS waved this point, and proceeded to the *second*, which was clearer; and found that the comprising led against Brown of Sneip, coming into the person of his son, (whom Carlips offered to prove, then represented his father as heir,) it was a consolidation and extinction, and that the comprising could not subsist in his person. It is true, if he had been only apparent heir, the acquiring of these rights would only have exposed them to be redeemable within ten years, conform to the act of Parliament 1661; or if the diligence had been on bonds granted by the apparent heir himself, and afterwards returned to him, it would have inferred a passive title by the act of sederunt 1662, made on the occasion of Glendinning against Nithsdale, *voce PASSIVE TITLE*: But here, where they alleged he was actually heir to the debtor, the LORDS thought it an extinction, he becoming both debtor and creditor; and though it was urged, that Carlips had consented under his hand, to Sir Michael Nasmith's acquiring that comprising, and so that was an homologation and acknowledgment that it was not extinct; yet the LORDS considered the consent behoved not to be divided, but taken with its quality and condition, that the lands appraised should be sold for his payment and relief; and seeing that is not done, but the lands carried away by Sir Michael's apparent heir, who has bought in the comprising, the consent cannot be obtruded against him. The LORDS also discoursed on the *third* point, whether an appriser fell under the exception of the act of Parliament 1621, anent singular successors purchasing *bona fide* for a price, and in satisfaction of their just debts; and if an appriser can be reputed a purchaser in propriety of law, he being at most only a legal buyer, and not for an adequate price, the lands being oftentimes worth more than the sum in the comprising; and statutes being *stricti juris*, are not to be extended *de casu in casum*; though it was alleged there was the same equity for both: But this point was not decided.

1694. *January 24*.—THE LORDS advised the farther debate, in the case between Alexander Burnet and James Nasmith, (mentioned 28th December 1693,) and found, that though the coming of an apprising into the person of an heir served was an extinction, he being *eadem persona cum defuncto*, and so there is *concursus debiti et crediti, et confusio*; yet where it is not by a legal title of a service and retour, but by a *præceptio hæreditatis*, and a disposition of the appraised lands, that it was not equivalent to the being heir; for though it was more than a passive title, and gave him *active* right to the lands disponed, so that one could not be served heir therein, yet it was not an universal active title and representation *in omne jus defuncti*, and therefore found there was no extinction in this case.

Fol. Dic. v. 1. p. 195. Fountainhall, v. 1. p. 550. 567. 585. 597.

1697. July 21.

JOHNSTON *against* JOHNSTON.

No 8.

A person having appraised lands on a bond granted by the apparent heir, and the appraising coming afterwards into the next heir's person, who was liable *passive*, this heir assigning the appraising to a third person, and he excluding the creditors by it, the Lords found that the appraising having been once in the apparent heir's person, it was thereby extinguished, so that he could not transmit it to a third party.

IN a cause between Mr William Johnston, son to Westerraw, against Sarah Johnston, the LORDS decided this point, which was new. Jardine of Apple-girth appraised the lands of Lockerby, on a bond granted by the apparent heir. This appraising afterwards comes into the next heir's person, and who, by his contract of marriage, so far represents as to undertake his father's debts. This heir assigns the appraising to Mr William Johnston, and he excluding the creditors by it; it was *alleged*, The appraising was extinct by confusion *ipso momento* it came into the person of the heir, so he could make no valid conveyance of it; for he being both debtor and creditor *confusione tollebatur*, that being *inter modos dissolvendi obligationem*. *Answered*, By the act of sederunt 28th February 1662, in Glendinning against Nithsdale, *voce PASSIVE TITLE*; *that* conveyance was found a passive title, but did not declare the debt extinct; and so adjudications on such bonds have been commonly made use of to be a title for apparent heirs to quarrel their predecessors' deeds by reductions. *Replied*, The inferring a passive title is a greater penalty and certification, than to declare the right null, and these conveyances have proven a seminary of fraud, whereby apparent heirs have created vexation to their predecessors creditors. Therefore the LORDS found it an extinction so as he could not transmit it to Mr William Johnston. But in the case of Hugh Neilson, the LORDS found no extinction, though he had acquired a right to a debt of his father's, because his representing his father was no otherways proven against him, but that he being out of the kingdom and pursued in a *cognitionis causa* for a debt of his father's, he gave not in a renunciation and so *præsumptione juris* became personally liable; for the LORDS thought it reasonable to repon him against this passive title, by allowing him yet to give in his renunciation, unless they could instruct that he truly represented some other manner of way: so as it be a real addition or immixtion, and not a presumptive one. *See PASSIVE TITLE*.

Fol. Dic. v. 1. p. 195. Fountainball, v. 1. p. 788.

1726. January 4.

CUMING of Coulter *against* IRVINE of Crimond, &c..

No 9.

A person tailzied his lands to heirs male. Afterwards he granted a bond of provision to his second son;

IN the year 1683, Alexander Irvine of Drum made a tailzie of his estate in favour of himself, and the heirs male of his body; which failing, to certain other heirs male named. In the year 1687, the said Alexander Irvine executed a bond of provision for the sum of L. 80,000 Scots to his second son Charles, and the heirs male of his body; which failing, to the other heirs male of the persons nominated and designed by him to succeed in his lands and heritages.

The heirs male of the entailor's body having failed, the succession, both of the entailed estate and of the bond, devolved upon Alexander Irvine of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedite any service to the said bond of provision. After his decease, his son and apparent heir granted a bond for L. 10,000 Sterling to a trustee, who thereupon charged him to enter heir of provision to Charles, in order to make up a title by adjudication to the L. 80,000 bond; and having thus established the bond in his person, he again charged the apparent heir of tailzie in the estate of Drum, and obtained an adjudication against the estate for the said debt of L. 80,000. In a process at the trustee's instance against the heirs of entail, concluding that the bond of L. 80,000 Scots was a subsisting debt, and did effectually burden the entailed estate of Drum; the LORDS found, That the heir male of Murthill being served heir to the estate of Drum, his service did not state him in the right to the L. 80,000 bond, so as to operate a confusion in his person; and that this Drum being charged to enter heir in special to Charles, and adjudication having thereon followed, did not operate a confusion of debtor and creditor in this Drum's person; and therefore found, that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum. See APPENDIX.

No 9.
whom failing, to the heirs of tailzie. The heirs of the entailor's body failed; and a more remote heir of tailzie succeeded, to both the estate and the bond. The bond remained a distinct and subsisting debt upon the estate.

Fol. Dic. v. 1. p. 196.

1728. January 27.

JOHN MURRAY against NEILSON of Chapel, and LANIRK of Ladylands-

In a competition betwixt these parties, about the lands of Conheath, Neilson and Lanirk's titles, being apprisings deduced against the lands of Conheath, bought in by Elizabeth Maxwell the apparent heir, and conveyed from her to these purchasers; it was objected against the apprisings, That they were extinct *confusions*, being bought in by the apparent heir, during the legal, after she had behaved as heir, liable thereby to all her predecessor's debts, and to these apprisings among the rest; whereby there came to be a *confusion* of debit and credit in her person.

To which it was answered, That apprisings were never thus understood to be extinguished; witness the noted case of an apparent heir, possessing by virtue of an adjudication led upon his own bond, which was never understood to be an extinction, though a stronger case than that in dispute. See Lord Stair, l. 1. s. ult. § 9. in med. And though such a possession, since the act of sederunt 1662, did infer a passive title, nevertheless the adjudication was a good title, whereupon to possess the estate, and even to dispose upon it by sale, which could never be quarrelled by a succeeding heir. And indeed the same thing continues to be law still, even after the act 1695; for that law only makes the heir possessing upon such a diligence *passive* liable to the debts, but does not

No 10.
An apparent heir, liable *passive* upon behaviour, having purchased an apprising upon his predecessor's estate, while the legal was current, and conveyed the same to a singular successor; the same was found effectual in a competition, and not extinguished *confusions* in the apparent heir's person.

No 10.

annul the diligence. And the true reason of all is, that *confusion* is not a proper *extinction*, but only a temporary *suspension*, while the debit and credit continues in the same person; for though the same person can support the legal characters, at the same time, both of creditor and debtor, so as to preserve the debt from an *ipso jure* extinction; yet because one cannot pay to or discharge himself, the debt must stand suspended as to execution, during the time the same man is both debtor and creditor. But whenever the *confusion* ceases, the debit and credit falling in different hands, the suspension ceases at the same time; the debt revives, and has its force as before the suspension. And to this purpose Lord Stair, in the forecited place, expresses himself, 'If by different successions,' says that noble author, 'the debtor and creditor should become distinct, the obligations would revive, as in many cases may occur; and so *confusion* is not an *absolute extinction*, but rather a *suspension* of obligations.'

'THE LORDS repelled the objection.'

Fol. Dic. v. 1. p. 195. Rem. Dec. No 102. p. 196.

No 11.

A person purchased lands, on which his father had a wadset. Being heir to his father, the wadset became extinct *confusione*, and he was under no necessity to make up titles to it.

1751. November 27. ROBERTSON of Urchany against JOHN DAVIDSON.

ALEXANDER ROSS of Easterfearn, purchased a wadset upon the west quarter of Meikle Allan; and was infeft therein.

William Ross of Easterfearn, Alexander's son, purchased the irredeemable property of these lands, and was infeft; but made up no title to the wadset, in which he was apparent heir. He granted an heritable bond thereon to Captain David Ross his brother; to whom succeeded Alexander Ross, solicitor at law in London; and he assigned it to John Davidson, clerk to the Court of Justiciary.

Charles Robertson of Urchany, and others, led adjudications against Alexander, the son of William, as charged to enter heir to his grand-father; whereby they claimed to carry the wadset; whereas the heritable bond granted by William, could only affect the reservation, which was all that was in his person.

Pleaded for Mr Davidson; William Ross, who had a competent title to the property of the estate, and was apparent heir in the wadset, which was an incumbrance thereon, needed not to make up titles to the incumbrance; which, by coming into his person, became sopite. It is the common way of proprietors to rest upon one title, and neglect others which may belong to them; and if such accessory rights could be reared up by adjudications against their successors, to evict their estates from their disponees, it would shake the titles to very many estates. Agreeable to this doctrine was the decision 19th February 1710, Colonel Erskine against Sir George Hamilton, (*see COMPETITION*); and 15th February 1750, on the Duke of Gordon's claim for the estate of Lochiel, it was found, That the Duke having entered heir to his grand-father in the estate, needed not be served to his father, in the adjudications he had thereon, and on

that title had infeft Lochiel as his vassal, but had sufficient right to them by his apparenacy ; and so was Lochiel's superior, on which title he claimed his estate, *voce* FORFEITURE.

Pleaded for Urchany ; There is no *ipso jure* extinguishing of feudal rights ; but they must be taken away in a proper manner. The Earl of Dundonald disposed lands to his son the Lord Cochran, and infeft him base ; and, on his death, disposed them to his grand-son, who was infeft ; and disposed them to the Marquis of Clydsdale, No 3. p. 1262. It was found, that the disposition only carried the superiority ; and the apparent heir, after his death, in the base infeftment, carried the property. And the like decision was given in the case of Menzies of Culterallers, and Dickson of Kilbucho. *See* HEIR APPARENT.

Replied ; In both these cases the infeftment was in the superiority, and the disposers were apparent heirs to the property ; but their onerous debts were sustained to affect the estate ; and the subsequent heirs, making complete titles to the property, were preferred only to their gratuitous disponees.

Observed ; That both superiority and property were irredeemable rights, and distinct ; but a wadset was redeemable, and considered as an incumbrance on the property.

THE LORDS repelled the objection made to the infeftment granted by William Ross of Easterfearn, to Captain David Ross ; and found, that the said William Ross having purchased the irredeemable right to the property of the west quarter of Meikle Allan, it was not necessary that he should make up a feudal title to the wadset of the said lands, that was in the person of Alexander Ross his father, and in which he was apparent heir ; and that these incumbrances could not be taken up by the creditors of the said William Ross, or of Alexander his son, as rights preferable to the property that was vested in William Ross.

Reporter, *Drummore.* Act. *Lockhart.* Alt. *R. Craigie.* Clerk, *Gibson.*
Fol. Dic. v. 3. p. 162. D. Falconer, v. 2. No 235. p. 287.

1757. December 1. GORDON against MAITLAND.

A PERSON being creditor in several debts upon an entailed estate, the LORDS found, That the debts were not extinguished *confusione* ; but that, after his death, his heirs whatsoever could pursue for them against the succeeding heir of entail.

Fol. Dic. v. 3. p. 162.

* * * *See* The particulars of this case, *voce* TAILZIE.

Apparent heir, applying the rents for purchasing an adjudication, operates an extinction ; *see* PAYMENT.

See Glendinning against Nithsdale, *voce* PASSIVE TITLE. *See* APPENDIX.

CONQUEST.

SECT. I.

Clauses of Conquest, how far extended.

1623. *March 14.*BESSIE SKENE and her SPOUSE *against* The HEIR of THOMAS FORBES.

THOMAS FORBES, burgess of Aberdeen, by his contract of marriage with Bessie Skene, obliged himself to infeft her in conjunct fee, in all the lands and annualrents he should conquest, and to provide the same to the heirs to be procreate betwixt them; which failing, the half to his heirs, and the other to her heirs, heritably. He thereafter conquered the lands of Robisland, and certain fishings holden feu of the town of Aberdeen, and lent 6000 merks to Mr William Forbes of Craigivar, to himself in liferent, and to one of his daughters in fee. He being deceased, his relict pursued her son, heir to her husband, to infeft her in liferent, and to provide the fee of all the lands and annualrents conquered by her husband, to the heirs of their marriage; which failing, the half to his heirs, and the other half to her heirs. The heir suspended, *alleging*, That he could not infeft her in Robisland, and the fishings, because, by acts of the Magistrates and Council of Aberdeen, ratified by Queen Mary, it was not leisom to them to feu any of their lands or fishings, but to actual burgesses of the town, and their heirs male, and that all heirs female were expressly excluded; and also, it was thereby provided, that no infeftment of conjunct fee or liferent should be given thereof to any woman; and so the charger, not being capable of any infeftment to these lands, the letters should be *simpliciter* suspended. Notwithstanding whereof, the LORDS found, That the heir should give her *damnum et interesse*, because he was not to be allowed to make any conquest which might prejudice her of the benefit of conjunct fee of all his conquest, according to the provision of her contract of marriage.—Next it was *alleged* in the suspension, That the relict could have no conjunct fee of the 6000 merks owing by Craigivar, because it was not conquest, the defunct not being infeft; but only that the term of payment being bypast, that annualrent should be paid to the said Thomas Forbes during his life, and to his daughter after his decease; notwith-

No 13

He who by contract of marriage, was bound to infeft his wife in conjunct fee of all future conquests, acquiring thereafter lands holden burgage, which, by acts of the town, could only be holden by burgesses, their heirs male, &c. his heir was ordained *prestare damnum et interesse* to the relict.

No 1.

standing whereof, it was found conquest of an annual rent, and that she should be infeft therein. The husband had conquered the wadset of a tenement in Aberdeen, wherein she was also ordained to be infeft, and in case of redemption that the money should be re-employed to her behoof during her lifetime.

Fol. Dic. v. 1. p. 196. Haddington, MS. No 2814.

1628. *March 12.*

LA. DUMFERMLING *against* The EARL.

No 2.

A husband was bound by his contract of marriage to infeft his wife in all lands and heritages he should conquest during the marriage, and having, during the subsistence thereof, first acquired tacks of certain lands, and some years thereafter, the heritable right thereof, she was found to have right only to the rents of the lands as payable to by these tacks, but not to the profit accruing from the tacks, in respect there was no express stipulation in the contract, providing her to the liferent of tacks or other securities purchased during the marriage.

IN an action by the Lady Dumfermling against her son, as heir to his father, for fulfilling of that part of her contract of marriage, whereby her husband was obliged to infeft her with himself, in all lands and heritages, which he should conquest the time of their marriage; it being controverted betwixt the parties, if that clause of the contract, of the tenor foresaid, (for that was the tenor of the same) did extend to lands or teinds, whereof the umquhile Earl, her husband, since their marriage had acquired an heritable right to himself and his heirs; the same lands and teinds before that heritable right, being acquired by her said husband, in tack and assedation also since the marriage, and before the heritable right acquired by him two years at least, in respect whereof he being tacksman, and the tack being set for longer space, that would endure longer than the Lady's lifetime; the defender *alleging*, that the posterior acquiring of an heritable right could not be found, such a conquest, as might compel the heir, to give the relict infeftment thereof, as of lands whereof she could be effectually infeft, as conquest lands, the same being under so long tacks procured before, which ought of reason to stay the effect of the infeftment, so far as might extend to the profit of the lands, which would only pertain to the heir, by reason of the preceding tacks; and the pursuer *replying*, that if this should have place, all contracts bearing such clauses should be eluded, and the wives defrauded of their provision introduced in their favours; for, to prejudice the infeftment, which is provided to the wife, it should be then lawful to the husband who minds to conquest lands, whereby the wife would receive the benefit of infeftment, to defraud her thereof, by taking a preceding long tack of the same, whereof he shortly thereafter takes an heritable right, though the preceding tack is acquired also since the marriage, yet he might elude that clause of infeftment, if shortly after the tack he had also acquired infeftment, which is against the mind of the contract, appointing her to be infeft in all which he should conquest; this exception was sustained, notwithstanding of the reply; for the LORDS found, that the acquiring of an heritable right by the husband, of that whereof he had acquired tacks two years of before, of the endurance foresaid; and albeit the tacks were also acquired by the husband since the marriage, they could not be reputed a conquest, which might compel the heir to give the relict infeftment profitably, or of any greater benefit concerning the lands so acquired by her, except so far as was further acquired by the heritable

No 2.

right, in yearly profit, than was contained in the tack, viz. for the tack-duty allenary, if the infestment did free the receiver of that tack-duty; for, albeit the heir ought to give her infestment thereof, as of a purchase, yet it was found it ought not to be so simply given, but with exception and reservation of the tack foresaid, and the benefit thereof to the heir; and, as concerning the destituting of the party of the mind of the contract, which intends to give the wife her liferent of all which the husband should acquire; this contract was not of that tenor, but did only bear, to infest her in all lands and heritage the husband should conquer; and, if parties agree to provide the wife to liferent of tacks or bonds, or other securities and benefits purchased by their husbands, the same ought to be so expressed; but not being expressed by the parties in writ, could not be extended otherways than they agree in the words of their contract.

Act, Aiton & Stuart.

Akt. Hope, Nicolson & Burnet.

Clerk, Hay.

Fol. Dic. v. 1. p. 196. Durie, p. 359.

1629. February 20.

DOUGLASS. against WHITE.

No 3.

A husband was bound to infest his wife in the conquest of all lands, annualrents, &c. He lent out money upon annualrent, bearing no clause of infestment, yet it was found that the clause comprehended this subject.

A HUSBAND being obliged to his wife in his contract of marriage, to infest her in liferent in all lands and annualrents, which he should conquer and acquire the time of their marriage; and he having lent out some monies to certain debtors by obligations, whereby they were obliged yearly to pay to the creditor 10 for 100, ay and while the principal sum were paid; the saids bonds neither bearing a clause of infestment therefor, nor of paying annualrent as well not infest as infest, but being of the foresaid tenor, to pay annualrent ay and while the principal sum were [re-paid]; it was found, That the heir of the husband, albeit he could not give her infestment and sasine of the said annualrent, he neither being infest therein, nor the creditor bound to give him infestment, yet that the heir should give her her liferent right *habili modo*, of the said suma, albeit the tenor of the contract proports as said is.

Clerk, Hay.

Fol. Dic. v. 1. p. 197. Durie, p. 428.

* * Spottiswood reports the same case :

By contract of marriage passed between James Douglas and Elizabeth White, he was obliged to infest her in all lands and annualrents conquest by him during the marriage. After his decease, she and Mr Thomas Reidpath, her second husband, pursued the heir of the first marriage, Robert Douglas, to infest her in liferent, in the annualrents of certain heritable bonds acquired by umquhile James in his time. *Alleged*, That clause in the contract was only to be under-

No 3.

stood of such annualrents wherein James was infeft, or at least might have been infeft into; but so it is, that there was a number of bonds whereof she craved her liferent, whereupon no infeftment could follow, bearing only an annualrent of ten for the hundred. THE LORDS found that she should have her liferent, albeit they had not the clause (as well not infeft as infeft) and although the heir could not infeft her in such annualrents, yet they found that she should be provided to them by some other legal course.

Spottiswood, (HUSBAND & WIFE.) p. 158.

1673. July 15.

ROBSON against ROBSON.

No 4.

A clause of conquest providing to the wife the liferent of all lands, annualrents, goods, and gear conquest during the marriage, was found not to extend to bonds, unless the wife could prove that they came in place of, and were purchased by the goods and gear acquired during the marriage.

ISOBEL ROBSON pursues James Robson her son, as heir to his father, for implement of her contract of marriage, by which she is provided 'to all lands, annualrents, goods and gear, conquered during the marriage;' and subsumes, that her son sold and disposed of several goods belonging to his father, and took the bonds in his own name, which therefore he ought to re-employ for her liferent use. The defender *alleged* absolutor, because the goods libelled were his own proper goods in his own possession, and sold by himself, whose possession infers property in moveables; and it is not relevant that once they were the father's goods, because he might have gifted or disposed them to his son, without either witness or writ, unless the pursuer referred to the defender's oath, that the goods belonged to his father, and were neither gifted nor disposed to him. It was *answered* for the pursuer, That albeit possession of moveables presumes property, and that a prior right of property is not relevant, yet it is but a presumptive probation of property, which may be taken off by a stronger contrary probation, and thus the pursuer offers to prove, that the son when he sold the goods was in his father's family, and that the goods were his father's proper goods.

THE LORDS found the answer relevant to be proven by witnesses, but as for the goods that the son sold after he was married and forisfiliate, the LORDS sustained not the answer as to these, but ordained the son to be examined, how he got them from his father, and before whom, unless he had meddled with them violently or clandestinely.

The pursuer *insisted* further for the liferent of all bonds, bearing date during the marriage. The defender *alleged*, That this clause of conquest could not be extended to bonds, unless they had been expressed; for lands, annualrents, goods and gear, never comprehend *nomina debitorum*. It was *answered*, That the meaning of the parties was certainly to give the wife the liferent of bonds, seeing she was provided to lands and annualrents, which was more, and here, she had no more provision but this clause of conquest; and seeing the bonds behoved to have been made up, either of money or other moveables, which are comprehended in the clause; it is to be presumed, that the same was acquired

during the marriage, which ought to put the burden of probation upon the son, and that the bonds was granted for sums due, or moveables acquired before the marriage.

THE LORDS found, That the clause did not extend to bonds bearing date after the marriage, unless the wife prove that they were granted for sums or moveables, acquired during the marriage.

The pursuer further *insisted* for her liferent of lands acquired originally in the name of his eldest son, when he was in his family, and had no means. It was *answered*, That such clauses of conquest among the meaner sort, do run of course, and are insert by notaries without communing, and their meaning can never be understood to impede the husband in the free disposal of his estate and goods during his life ; but that is only understood to be conquest during the marriage, which remains so at the husband's death, and the furthest extension that can be of this clause is, that a husband should not do any fraudulent deed to prejudice his wife of a competent provision ; but it cannot hinder the father to give portions to his children, or to give a competent provision to his eldest son at his marriage, which is onerous, and for a tocher. It was *replied*, That by such provisions, wives are most favourable creditors ; and, though the husband may dispo-
 ne for necessary and onerous causes, yet he cannot gratuitously gift to his own children ; and it hath been found by former decisions, that a right taken in the name of a second son, fell under the clause of conquest, much more of the eldest son ; and that bonds taken to the father, and after his decease to such children named, were by that clause to be liferented by the mother, especially where she hath no special provision. It was *duplicated*, That in these cases it was not alleged that the deeds in favours of the children, were only competent provisions, leaving means for a competent provision to the mother.

THE LORDS did not find that such clauses would exclude competent provisions to the children, even to the eldest son, if there were competent means for a provision to the mother remaining ; but, for making it appear, whether there was any thing done fraudfully in prejudice of the clause, they did, before answer, ordain the son to condescend what remained for a provision to the mother.
 See PROVISION to HEIRS and CHILDREN.

Fol. Dic. v. 1. p. 197. Stair, v. 2. p. 211.

* * * Gosford reports the same case :

THE said Isobel being provided by her contract of marriage, to the liferent of all rents, lands, annualrents, goods and gear, that should be conquest during the marriage betwixt her and the defender's father, pursues the said James as heir, to infeft her in liferent in a tenement of land purchased during the marriage, in name of his said son, who was *in familia*, and had no means of his own to purchase the same ; as likewise, for a liferent of several bonds assigned by the father to the children during the marriage. It was *alleged* against the first member, That the defender could not be obliged to give her a liferent in-

No 4.

feftment of the tenement, as being conquest; because, nothing can be reputed conquest, but that wherein the conquerer died infeft and seised; and, notwithstanding of any obligation to infeft a wife in lands, conquest during the marriage, if he disposed the same in his own lifetime, his heir is not obliged to give her as much yearly as the liferent would amount to; and, in this case, the defender is stranger, seeing the father was never infeft, but the right is made to the son himself *proprio nomine, et non constat* if the same was purchased with the father's means. As to the second member, it was *answered*, That the wife being provided to a certain conjunct-fee, with an additional clause of liferent of all lands, goods and gear, the same cannot comprehend bonds which are not at all enumerate, and being *nomina debitorum*, are, of their own nature different from goods and gear, rents, or annualrents, and so ought not to be comprehended in that clause, which is not favourable, and ought not to be extended. It was *replied* to the *first*, That there was a great difference betwixt dispositions made of lands conquest to strangers or creditors for an onerous cause, and those made to apparent heirs, or when the rights are taken in their name, which ought to be looked upon as if the father had been infeft, and resigned in favours of the apparent heir; in either of which cases, he being liable to his father's creditors, ought to fulfil his obligations in the contract of marriage, the pursuer being the most favourable creditor. To the *second* it was *replied*, That the clause of conquest, bearing not only rents, but annualrents, and all goods and gear whatsoever; the same must comprehend bonds of borrowed money to which annualrents can only relate, and which are ordinarily the product of goods and gear, being sold and converted into money or security. THE LORDS, as to the *first* member, did find that it ought to be considered, if the wife was provided sufficiently to a liferent, without respect to the said clause of conquest; and, in order thereto, the defender was ordained to condescend and instruct, after which, they declared they would decide this point in law; and, with regard thereto, as to the *second*, they found that bonds not being specially mentioned could not fall within the clause of conquest, unless the pursuer would offer to prove that they were made, as the price and product of merchandise, which were the goods and gear wherewith the father did traffic.

Gosford, No 625. & 626. p. 362.

No 5.

A bond granted as the price or composition of a succession, found not to fall under conquest.

1678. January 29.

STUARTS against STUART.

UMQUHILE Walter Stuart, in his contract of marriage with his second wife, provides 20,000 merks to the heirs or bairns of the marriage, and obliges himself, that what lands or annualrents he shall acquire during the marriage, to take the same to himself, and the heirs or bairns of the marriage, one or more. Of this marriage there was a son and five daughters. The said umquhile Walter

No 5.

did secure 20,000 merks, due to him by Blackhall, to himself, and the heir of the marriage. The five daughters do now pursue their brother to denude himself in their favour, as bairns of the marriage; because the bond bears *borrowed money*, and of a date during the marriage, which was always sufficient probation of conquest during the marriage. It was *alleged* for the defender, *1mo*, That this clause of conquest must be understood, not of all the bairns of the marriage, but the heirs of the marriage, at least it bearing bairns or heirs, it must be interpreted as an alternative obligation, either to provide to the heirs or bairns of the marriage; and the father being debtor, and having made his election, by securing the heir of the marriage in this sum, the bairns are excluded *nam in alternativis electio est debitoris*. *2do*, Clauses of conquest were never extended to rights, in which the contractors do succeed, and are not acquired by their own industry; for such clauses are to encourage wives to be diligent in acquiring, which cannot relate to accidental succession. And it is offered to be proven, that albeit this bond bears, *borrowed money during the marriage*, yet the true cause thereof was this, that David Stuart, the defunct's younger brother, by a second marriage, having died without issue, in a land estate, the same befel to the defunct as heir of conquest; and, by transaction, this bond was granted to the defunct for his right, whereupon he did denude himself in favours of Blackhall his eldest brother; so that this bond being either the price or composition for his succession to his brother, falls not under the clause of conquest, and therefore was warrantably taken in favours of himself and the heirs of the marriage, and not of the bairns.

THE LORDS found, that, by the clause of the contract, all the bairns of the marriage were heirs of provision in the conquest, and that heirs or bairns was not alternative, but exegetic; and that the father, being debtor in the clause, could not effectually alter the clause of conquest in favours of one of the bairns; but found, that clauses of conquest did not extend to rights falling by succession, even though the defunct was heir of conquest; for conquest, as to heirs, is in opposition to heritage. But in these clauses of conquest, albeit the right was conquest to the first defunct David, yet was not so to Walter, succeeding as heir to David, but he did succeed to his brother therein; and therefore the allegiance was found relevant to be proven by the oaths of the witnesses, and communers in the agreement betwixt Walter and his brother and Blackhall, that this sum was either the price or composition for the defunct's succession to his brother David.

Fol. Dic. v. 1. p. 197. Stair, v. 2. p. 604.

1682. February.

AITKIN against ———.

No 6.

FOUND, that an obligation, in a contract of marriage, to provide the wife to a liferent of what lands, teinds, annualrents, &c. not mentioning sums of money,

No 6. should be conquest during the marriage, was found not to extend to the annual-rent of moveable sums.

Fol. Dic. v. I. p. 197. Harcarse, (CONTRACT of MARRIAGE) No 342. p. 83.

No 7. 1682. *March.* YOUNG PRESTONGRANGE *against* The LADY CRAIGLEITH.

FOUND, that an obligation to provide a wife to a third, in liferent, of lands and heritages to be conquest during the marriage, did comprehend a sum belonging to the heir, by a clause secluding executors, as falling under the word heritage. Upon a representation, that clauses of conquest are to be strictly interpreted; and, therefore, by heritages in this case, heritages by infeftment are to be understood; the interlocutor was stopped: but it was thereafter adhered to.

Fol. Dic. v. I. p. 197. Harcarse, (CONTRACT of MARRIAGE) No 343. p. 83.

No 8. 1696. *February 5.* YOUNG and CHALMERS *against* YOUNG and MACKY.

Two daughters of a second marriage served themselves heirs in some tenements in Edinburgh, by hasp and stapple, on a clause in their mother's contract of marriage, bearing a provision of all goods and gear to be conquest during the marriage, to the children to be procreate thereof; and a reduction being raised by the bairns of the first marriage, the LORDS found these words of the clause of conquest could not extend to houses, unless it had born lands and heritages, and this notwithstanding the children of the first marriage were provided in a special sum, which they had received and discharged; yet the LORDS found they might reduce this service and infeftment, and succeed to the houses as general heirs of line.

Fol. Dic. v. I. p. 197. Fountainball, v. I. p. 708.

No 9. 1730. *July.* MERCER *against* MERCER.

In a contract of marriage, there is a provision of conquest in favours of the bairns of the marriage, in the common stile, of all that the husband should conquest or acquire during the marriage. During the standing of the marriage, the husband got left him, as a pure donation, by way of legacy, the sum of 12,000 merks; and the question thereupon occurred, whether this was comprehended under the above clause of conquest? THE LORDS found it was not. *See APPENDIX.*

Fol. Dic. v. I. p. 197.

S E C T. II.

Provision of Conquest, whether burdened with Debts contracted during the Marriage.

1627. July 3. E. of DUMFERMLINE against His MOTHER.

IN a suspension betwixt the Earl of Dumfermline and his Mother, where the Lady his mother charged the Earl suspender, her son, upon her contract of marriage, as heir to his father, to infest her in the lands of Inneresk, which were conquered by her husband the time of their marriage; seeing, by her contract of marriage, her said husband was obliged to provide her to her liferent of all lands which he should conquer the time of their marriage; the LORDS found the suspender was holden to give the charger an liferent infestment of the saids lands, in respect of the said clause of the said contract of marriage, which clause they found no ways to be elided by the reason of the suspension, which propoerted, that the suspender his father, who was contractor, was only obliged, by the said contract, to provide the Lady to the liferent with himself, of such lands as he should conquer during their marriage, which words necessarily implied, that the conquer behoved to be made to himself, and that he should be first infest therein himself, otherways it could not be repute a conquer to him; and it was of verity, that these lands of Inneresk, albeit acquired in the time of their marriage, were not acquired to her husband, neither was he ever infest therein, but by the contrary the same were by the principal contract of vendition acquired to the suspender heritably, no mention being made therein of his father; likeas the suspender was infest therein, and not his father; and so the suspender *alleged*, that the clause of the contract could not be effectual to the Lady to give her the liferent of these lands, whereof her husband's self (if he were living) could claim no liferent, the same being provided to his son, without any reservation; which was repelled by the LORDS, and found, that the liferent thereof was due to her: And albeit the suspender further *alleged*, that he stood debtor in the same sums which were given for the price of the lands, or in as great sums as the price thereof extended to, which rested unpaid the time of his father's decease, and which he as heir behoved now to pay; so that it were against all reason that he should be subject to pay the price of the land, and that the Lady should bruik her liferent thereof, as if it had been his father's conquer, which could not be so repute, the price thereof lying yet on the defender's head: This was also repelled; and, notwithstanding thereof, the Lady was found to have right to seek her liferent thereof, seeing the time of the buying of these lands the defender was but an infant.

No 10.

A lady being provided in her contract of marriage to the liferent of the conquest during the marriage; her husband having purchased some lands, but infest his son therein without any reservation to himself; these lands were found conquered in the father's person, *ad hunc effectum*, to give the Lady the liferent thereof, altho' the price was still unpaid, and the son, as heir to his father, was bound to pay the same, and yet the Lady to have the liferent of the lands.

Act. Hope et Nicolson.

Alt. Aiton et Stuart.

Clerk, Hay.

No 10.

The like decision done 11th July 1632, La. Bonitoun *contra* L. Harden, where the relict, upon the like clause of her contract of marriage, got her liferent of lands acquired by her husband to his son, reserving only to the husband his liferent thereof.

Clerk, *Gibson*.

Fel. Dic. v. 1. p. 197. Durie, p. 302.

* * * Spottiswood reports the same case :

By contract of marriage, the Earl of Dumfermline obliged himself to infest himself and his Lady, in conjunct-fee, in all lands acquired by him during the marriage. She pursued her son, and the Earl of Winton his tutor, for implement thereof. *Excepted* by them for some lands near Musselburgh, That she ought not to be infest in them, because they were acquired by her son, and her husband's name was not in them. *Answered*, That the purchase was her husband's, her son being but a child, *et in sacris paternis, et nullum habens peculium adventitium*, and if way were given to such things, it were to open a gate to all frauds for frustrating of contracts of marriages.—THE LORDS repelled the exception, the pursuer proving, that the lands were conquest by my Lord's own money, and not by his son's.

Spottiswood, (HUSBAND and WIFE) p. 155.

1629. *January 24.* LA. RENTOUN *against* L. RENTOUN.

No 11.

In a case parallel to the above, the heir having paid the price after his father's death, and retired the bond granted by the father for the same, the Lords found, that the heir ought not to provide the relict in the liferent thereof, but with the burden of paying annualrent for that sum unpaid by the defunct: The reason of which was,

UMQUHILE L. Rentoun being obliged to provide his wife to her liferent of all conquest to be made by him during the time of their marriage; whereupon she having charged her son, his heir, to provide her to some lands conquered by her husband after the bond, which conquest being made by contract, no infestment having followed to him in his lifetime, but only a contract, by virtue whereof he possess the land; the charges were sustained, and albeit the husband was not infest, yet it was found a conquest, he possessing by virtue of that contract, and dying in possession, and the son continuing in that same possession; and because the husband, the time of his decease, stood obliged in a part of the price of the land conquered to the seller, which his heir was compelled to pay to him since, who sold that land to him. It was found, that the heir ought not to provide the relict to her liferent thereof, but with the burden of paying annualrent for that sum unpaid, and which the heir was compelled to pay sine of all terms after the provision, to be made to her by the heir, of her liferent thereof, seeing the sum which he was compelled to pay was by virtue of a bond made by the husband, expressly bearing payment of the sum owing by him for the price of the same land; whereas, if the bond had not

made specific mention that the sum was owing by the defunct for the same cause, viz. for the price of these lands, the LORDS would not have so decided; for, if the price had been paid by the defunct to the seller of the land, and if he had borrowed the money from another to pay the samen, and that he had remained at his decease debtor therein to that creditor, the bond making no mention that that sum was borrowed for the cause of that alienation, *eo casu* the burden of payment of that annualrent, of that sum so borrowed, would not lie upon the relict, but she would have her liferent free of that burden: And the contract bearing, to provide to her her liferent of all possessions purchased by him, it was questioned, if that should extend to tacks acquired by him, but that was not decided.

No 11.
that the bond
granted by
the defunct
bore express-
ly to be for
payment of
the sum ow-
ing by him
for the price
of these lands.

Act. *Oliphant.*

Alt. *Craig.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 197. Durie, p. 417.

* * * Spottiswood reports the same case :

ALEXANDER HOME of Renton was obliged to infest his wife in all the lands conquest by him after the marriage. She pursued her son, as heir to his father, to infest her in thirteen husband-lands of Renton, alleged conquest by his father the time of their marriage. *Alleged*, He ought not to infest her in two of these husband-lands acquired from Thomas Home, because albeit the bargain was made by his father in his own time, yet he was never infest in them all his time, and so they could not be repute conquest.—THE LORDS repelled this allegiance, as had been done between the Countess of Dumfermline and her Son, No 10. p. 3053. Next *alleged*, Though acquired by his father, yet the greatest part of the price was paid by himself since his father's decease, and therefore he could not infest her, but with the burden of the annualrent of the sums he had paid out himself for these lands. This allegiance was found relevant.

1629. *Feb. 10. and March 6.*—In that same action she sought to have the teinds of the kirk of Hornden, which her umquhile husband had acquired by tack after the marriage; for, by the contract, he was bound to infest and sease her in all lands, annualrents, rooms, and possessions, acquired by him after the marriage.—THE LORDS would not sustain the charge for this part, in respect that her husband having acquired only a tack of these teinds, he could not infest her therein; and therefore the contract could not be extended to teinds, but only to lands wherein her husband could have been infest.

Spottiswood, (HUSBAND and WIFE) p. 158.

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1665. December 20.

LAIRD KILBOCHO *against* LADY KILBOCHO.

No 12.

Found in
conformity
with the
above.

THE Lady Kilbocho, by her contract of marriage, being provided to certain lands, with this provision further, that she should have the liferent of all lands conquest during the marriage, whereupon she obtained a decreet in the English time, which being now under reduction, it was *alleged*, the clause of conquest could only give her the lands conquest, with the burden of the annualrent of a sum due by the defunct to a person from whom he bought the land, as being a part of the price of the land, especially seeing, by a writ under the defunct's hand, he acknowledged that this bond was granted for a part of the price. It was *answered*, 1st, That a personal obligation cannot affect the land, neither can it affect the Lady's person; but, if the defunct had pleased, he might have granted an annualrent out of the lands conquest, which then would have affected it, which not being done, his declaring that this sum was a part of the price, cannot be effectual, nor can infer a probation against his wife in prejudice of her anterior right. 2^{dly}, This allegiance might be proponed as well against the heir of conquest as liferenter thereof; and yet it was never found, that the heir of conquest behaved to accept the land with the burden of the sums borrowed to buy it, nor yet to relieve the heir of line thereof; but, on the contrary, the heir of conquest has relief against the heir of line for personal debt, though borrowed for acquiring the right.

THE LORDS found, that the case was not alike with the heirs of conquest, whom defuncts do infest without any burden, and liferenters, who having a special competent provision, this general clause being but adjected as uncertain, is not so favourable, or so to be extended, seeing the husband did not infest the wife in his own time in the conquest; and therefore found her to be liable to the annualrent of this sum, which they found instructed by the husband's declaration, where the Lady's father is a subscribing witness.

Fol. Dic. v. 1. p. 198. Stair, v. 1. p. 328.

* * * Dirleton reports the same case :

IN the case betwixt ——— Dickson of Killoch, and Sandilands his mother, and her present husband, it was found, that a husband being obliged, by contract of marriage, to provide the liferent of such lands as he should acquire during the marriage, to his wife in liferent, and to the heirs of the marriage; and his heir being pursued for implement, and for resigning certain lands acquired by the husband, for a liferent to the relict;—the relict her liferent and right should be with the burden of a sum of money borrowed by the husband for making the said purchase; as to the annualrent of the said debt during the relict's lifetime.

THE LORDS considered, that though, in order to other ends and effects, and in special to determine the succession in favours of an heir of conquest, whatever lands are acquired by any person *titulo singulari*, are esteemed conquest; yet, in contracts of marriage, such obligations, anent conquest, are to be understood of what is acquired by the husband, with his own means and monies, seeing what is acquired otherways (the price or a part of it being borrowed, and the husband being debtor for the same) upon the matter, and in effect, is not conquest, and a free accession to the husband's estate; in so far as the price is a burden upon the husband's estate; and as the husband, if he had been charged himself, might have satisfied the obligation by giving an infeftment with the foresaid burden, so the heir may do the same.

Dirleton, No 9. p. 5.

* * * The same case is also reported by Gilmour :

IN the contract of marriage betwixt Mr Alexander Dickson of Kilbocho, with consent of John Dickson of Hartrie his father, and Isobel Sandilands, with consent of ——— Sandilands of Hilderston her father, beside jointure lands particularly provided to her, her husband is obliged to provide her to all conquest lands; and he having, during the marriage, acquired the lands of Mitchellhill, she, in the Englishes time, pursued her son as heir, and obtained decret against him, to infeft her therein. Of the which decret there being a review and reduction intended before the Lords, upon this reason, that the English Judges had repelled a relevant defence, viz. that the defunct having acquired the land a little before his death, the price thereof was borrowed from John Kello the time of the acquisition; whereupon he gave bond, bearing, that the money was borrowed to pay the price, containing an obligation to infeft him, not only in the saids lands acquired, but in certain others, for an annualrent to be paid furth thereof. This allegiance being resumed in the review; and it being added, that her own father, who was party-contractor with and for her, was witness subscribing in the bond; and it was offered to be proven, that the bond was granted the very day of the subscribing of the alienation, at least within a day or two after; and a practique betwixt this Renton, and his Mother was repeated, No 11. p. 3056. To which it was *answered*, That the obligation providing the conquest is simple, without condition or burden; and, in case of conquest, a wife is as favourable as an heir of conquest, who would succeed to the conquest lands, albeit the heir of line behoved to relieve him of the debt contracted for the acquiring thereof; the executor also would be obliged to relieve him thereof. And the practique meets not; because there the money was due by bond to the seller of the land for granting the alienation, which is not in this case, the money being borrowed from a third party, which was the reason of that decision. *Replied*, When the case of an heir of conquest

No 12.

shall occur, the Lords will consider of it, whether it be alike with the relict or not; but as to the relict, she is no ways to be favoured as to the general clause of conquest, she being more than sufficiently provided *aliunde*, and more than effecting to any portion that she brought with her; and law and reason allow, that lands acquired should be *cum onere* of the price.

THE LORDS found the reason of review relevant. Thereafter it was offered to be proven, by John Kello's oath, that a part of the money was owing to him before the acquiring of the land, which the LORDS would not sustain to take away the clause exprest in the bond, and to which her own father was witness.

Gilmour, No 172. p. 123.

No 13.

1676. June 27. EARL OF DUMFERMLINE *against* EARL OF CALLENDER.

A CLAUSE of conquest, in a contract of marriage, in favour of a wife, of all lands, sums of money, &c. to be purchased during the marriage, extends only to what the husband acquired during the marriage, more than what he had at the time of the contract, and with the burden of all his debts contracted during the marriage.

Fol. Dic. v. 1. p. 198.

* * * *See* The particulars No 7. p. 2941.

S E C T. III.

Subjects purchased partly before and partly after the Marriage, how far reputed Conquest.

1627. July 19. LADY DUMFERMLINE *against* The EARL.

No 14.

REVERSION, used after a contract of marriage, found to be of that nature, that the benefit thereof should be disposed to the wife, by virtue of a clause of the contract, to provide her to all conquest made *stante matrimonio*.

Fol. Dic. v. 1. p. 198. Kerse, MS. fol. 65.

1629. June 30. LA. DUMFERMLINE against The EARL.

IN this case, the Earl of Dumfermline having suspended the charges given him, for infefting the Lady his mother in the lands conquest by her husband after their marriage, it was found, that the lands, wherein the umquhile Earl was infeft before the marriage, being thereafter, or before, to a vassal, whose feu was never confirmed, and so whose right, being of kirk-lands, was null, and would not have excluded the umquhile Earl's right; the acquiring of this feu by the Earl, after the marriage, from the said feuer, was not found to be a conquest, whereby the heir of her husband might be holden in law to give her infeftment, or wherein the clause of that contract could strick, as if it had been conquest, seeing he being infeft in the property of that feu, whether it preceded or had been after the Earl's right, not being confirmed, took not away the right subsisting in the Earl before the marriage; and that right was not found to be of the naked superiority, except that the Lady would say that the feu was confirmed; and albeit, the Earl had satisfied the feuer to the full avail of these lands, yet that made it not to be a conquest of any such right and security of lands as might fall under the clause of the contract in favours of the Lady; neither was that satisfaction, or the umquhile Earl his receiving of the feu-duty diverse years from the feuer, and giving acquittances thereon conform to the feu, found to be an approbation of that feu; and that thereby he might not quarrel the same, the said feu being set by himself, when he was abbot, and having after the feu acquired an heritable right upon the annexation, whereby the Lady *alleged*, that he could never quarrel the feu set by himself, for not confirmation, it being his own deed. Likeas she *alleged*, that that supervenient right of the Earl's, who set the feu, viz. of his erection, whereby the necessity of confirmation ceased, behoved to accresce to the feuer, *quia jus venditori superveniens emptori prodest*, and therefore she alleged, that the feuer's infeftment was good against the setter and his heirs, and they could not quarrel the same for not confirmation, both in respect of the superveniency of the right to himself, and also in respect of the said tacit ratification; which answer for the Lady was repelled; for it was found, that albeit the Earl set the feu, yet though he could not quarrel it by any deed done by himself to the prejudice thereof, yet he might quarrel it upon the nullity of the law and statute of Parliament for not confirmation, which was the feuer's own deed; so that as any other, having received a valid right of these lands, might quarrel the said feu, so might the setter thereof, having received a right which another might have received; and the acquittances of the feu-duties, conform to the feu, were not found a ratification thereof, and this was the rather so found against this charger, where the dispute was not betwixt the granter of the feu and the feuer, but by the Lady claiming conquest by the purchasing of that feu by her hus-

No 15.

Lands were sold to a vassal, but the feu never confirmed. The superior was bound to infeft his wife in conquest, in which this feu, which returned to him, was found not excluded.

No 15.

band, as of a lawful right of the lands, which could not be quarrelled by him or his heirs, for the causes foresaid, which was repelled by the Lords.

Act. *Stuart et Aiton.*Alt. *Advocatus, Nicolson, et Burnet.*Clerk, *Hay.**Fol. Dic. v. 1. p. 198. Durie, p. 453.*

No 16.

New rights acquired during the marriage, to lands, which the purchaser had some right to before the marriage, are not to be reputed conquest.

1683. February 6. WAUCHOPE against L. of NIDDRIE.

IN an action of declarator pursued by James Wauchope, son and apparent heir of the second marriage, betwixt the Laird of Niddrie and Ker his second spouse, founded upon a clause in the said Niddrie's second contract of marriage, wherein he was obliged to provide the children of that marriage, to 10,000 merks, together with the hail conquest lands during the marriage, and subsumed, That the lands of Lochtower were conquest during the marriage, and that this Niddrie, as heir to his father, ought to denude himself thereof in favours of the said James;—it being *alleged* for Niddrie, That he could not be liable to denude himself of the saids lands, because the same could not fall under the clause of conquest, in regard his father had both a right of wadset thereupon, and two comprisings, and an irredeemable disposition from the apparent heir of the said lands;—and it being *replied*, That after the marriage, he had acquired preferable rights to these lands, and so *in tantum* the value of these rights were conquest:—THE LORDS sustained the defence for the Laird of Niddrie; that his father had either right by expired apprisings, or by an irredeemable disposition; and found, That any right acquired during the marriage, although preferable, did accresce to the former rights, and was but a completing of the conquest formerly begun before the marriage.

Fol. Dic. v. 1. p. 198. P. Falconer, No 47. p. 26.

1707. November 12.

FERGUS against BIRREL and ALEXANDER SWINTON.

No 17.

By a clause in a contract of marriage, conquest was to be divided, in case of no children, between the husband's and wife's heirs. The wife in the contract disposed her lands to her husband in

By contract of marriage in 1674, betwixt William Fergus and Agnes Birrel, one of the heirs portioners of Freuchie, she dispones her lands to him in liferent, and the heirs of the marriage in fee; which failing, to the said Agnes, her heirs and assignees whatsoever. In 1682, she grants a disposition of her lands to her husband, on this narrative, that he had paid several debts which affected her land, and that now all their children of the marriage were dead, and for the nuptial love she bore to him, &c. The husband being the first deceiver, she is told that her disposition being *stante matrimonio*, it was *donatio inter virum et uxorem*, and so revocable in law, she is advised to revoke it, and so dies; whereupon Isobel Birrel, her sister, and nearest heir, raises a reduction of that disposition against Mary Fergus, sister and heir to the husband, and insisted on

that reason, that it was a donation made by a wife to her husband, and so revocable, and actually *de facto* revoked.—THE LORDS reduced it.—Then *2do*, *alleged* for the husband's heir, That the disposition was not a *donatio*, but onerous, for it bore that he had paid debts affecting her estate.—THE LORDS found the narrative being *inter personas conjunctas*, could not prove *per se*.—Then *3tio*, It was *alleged* for the said Mary Fergus, That in fortification of her brother's disposition, she offered to prove that her brother had paid debts to the value of the land, it being only 200 merks a-year.—THE LORDS, before answer, allowed her to instruct the onerous cause of the disposition made to her brother; and accordingly, she adduced the creditors and others, who deponed that he paid off debts, affecting Agnes Birrel and her father, to the value of upwards of 2500 merks; and this probation coming to be advised, it was *objected* by the wife's heir, That it was no legal proof, seeing witnesses had deponed on the receipt of money, which could not be; that they were single witnesses, and not two concurring to one thing; that some of them deponed *super facto alieno*; and that he charged annualrents of these sums, whereas he was bound *jure mariti* to pay the current annualrents.—*Answered*, The disposition was sufficiently supported by the contract of marriage, where in the procuratory and precept of sasine the last termination was on his heirs. Next, in such a circumstantiated case as this, *semi plena probatio* was enough, and the Lords required not a rigorous probation, but such as would convince them that he had truly paid debts for her, though he was so simple as not to take assignation thereto.—*Replied*, The contract afforded no support; for the dispositive clause is evidently to her heirs, and that must regulate the whole subsequent clauses, though they have been tampering with the precept of sasine, and turned the word 'her' heirs to 'his' heirs; but *non refert* how it runs, when the dispositive part is clear. Likewise, his disposition does not so much as relate to the contract of marriage, nor found on it, but bears a quite distinct narrative; and they cannot repudiate or alter what their own writ bears.—THE LORDS thought the contract could not support the disposition, if bearing no relation thereto; and that the dispositive clause behoved to rule, where there was any variency or discrepancy in the writ; but found a *talis qualis probatio* of the onerous cause; and the debts paid by him for his wife were sufficient in this case; and, considering that the value of the heritage was but small, and little more than a competent tocher with a wife, therefore they found the onerous cause of the disposition sufficiently proven *ad victoriam causam*; and preferred Mary Fergus, the husband's heir, to the lands.—Then Isobel Birrel, the wife's heir, recurred to this fourth allegation, that she must have the half of this heritage, notwithstanding of his disposition to the whole; because the contract of marriage bore an express clause of conquest, that whatever lands, tenements, moveable goods or gear, he should purchase and acquire during the standing of the marriage, it should divide equally betwixt his and her heirs, failing bairns of the marriage; *ita est*, this is acquired by him *stante matrimonio*, and falls precisely under the clause of

No 17.
liferent;
thereafter,
during the
marriage,
for onerous
causes she
disponed
them to him
absolutely.
This acquisition
was
found to fall
under the
clause of
conquest.

No 17.

conquest.—*Answered*, This cannot be called a *feudum novum*, seeing the wife has renounced all right she had in favour of her husband; and her heir can claim no more than she; all right she had to the subject being conveyed, this must also extinguish and carry along with it the right she had by the clause of conquest.—*Replied*, Where one renounces and transmits any right they had at the time, a supervenient posterior right will not accresce thereto, as Stair observes, *lib. 3. tit. 2. § 2.*; and she had no right to the conquest at the time she disposed to her husband, but it existed after; and though an heir shall expressly renounce his father's heritage, yet when his father dies without making any right, his son succeeds as heir, notwithstanding his renunciation. Likeas it is clearly conquest; for after this disposition founded on, he caused his wife make a new one to one Smith, and he took a re-disposition to him.—THE LORDS found this right fell under the clause of conquest, and so the half of the lands disposed devolved on her; but thought she could not claim them as heir to her sister, but as heir of provision to her husband.

Fol. Dic. v. 1. p. 198. Fountainhall, v. 2. p. 402.

* * Forbes reports the same case :

By contract of marriage betwixt William Fergus and Agnes Birrel, heiress of Freuchie, she disposed her land to him and herself in liferent, and to the heirs betwixt them; which failing, to her own heirs and assignees whatsoever. And it was agreed, that what happened to be conquest during the marriage, should go to the longest liver, and the heirs betwixt them; and failing these, should be equally divided betwixt both their heirs and assignees whatsoever. Thereafter, *stante matrimonio*, Agnes Birrel having, for onerous causes, disposed her land to the said William Fergus, his heirs and assignees whatsoever, failing heirs of the marriage, reserving her own liferent; and he being infeft, there arose after the death of both a competition for the land, betwixt Mary Fergus, who claimed it by the disposition as heir to the husband, and Isobel Birrel, who, as heir to the wife, pretended to the half of the subject thereby disposed, as being conquest during the marriage.

Alleged for Mary Fergus; The disposition made *stante matrimonio*, could not be called conquest or *feudum novum*; in respect William Fergus was liferenter by the contract of marriage, and the disposition gave him only a remote *spes successionis*, or a right of substitution to the heirs of the marriage, who, had there been any, would have got the lands as heritage, and not as conquest; so that the substitution of William Fergus's heirs whatsoever, to the heirs to be procreated betwixt him and Agnes Birrel, is but a completing of his former liferent right; like an heritor purchasing apprisings affecting his lands, in order to complete his former right, which the Lords found to be no conquest betwixt Wauchope of Niddrie and his brothers, No 16. p. 3062. and betwixt the Lady Castlehaven and the Lord Collingtoun, No 22. p. 3068.

Answered for Isobel Birrel ; It is absurd to pretend that the disposition to the husband in fee, whereby he might have disposed the land to any other at pleasure, did only make him an heir of provision, who needed no service ; nor doth it follow, that because the husband had a liferent, the supervenient fee was not conquest. The decisions cited are not to the purpose, where acquisitions of fee for securing and completing former rights of fee, were not interpreted to be conquest ; but how can a fee be accessory to a liferent which it absorbs, or property be accessory to servitude ? And it is not strange in our law, to see a right made over one way, come back to the granter in whole or in part another way.

THE LORDS found, That by the clause of conquest in the contract of marriage, the lands disposed by the wife to the husband during the marriage, are conquest to him, and that the fee of the one half thereof falls to the heirs of the wife.

Forbes, p. 208.

SECT. IV.

Rights conquest, but taken in favour of younger children.—Lands conquest, and again sold.—Liferent of conquest over and above the liferent of a certain sum.—Sums conquest, but applied for purging incumbrances.—Who heir of conquest ?

1625. July 16.

KNOX *against* BROWN.

KNOX, relict of James Brown chirurgion, having charged her son, as heir to her husband, conform to her contract of marriage, to fulfil the same to her, upon that clause thereof, whereby the husband obliged him and his heirs, to provide her to her liferent of all sums which he should conquer, and employ the same upon lands or annuallrent, to himself and his heirs, during the time of their marriage ; this clause the LORDS found obligatory against the heir of the defunct, to bind him to employ and give the relict her liferent of all sums of money, which the husband had conquered during his lifetime, after the date of that contract, and which he had given out in heritable manner, and remained in that case, and of that nature, the time of his decease ; and found, That the relict, by virtue of that clause, had right to seek her liferent of the heritable sums conquered by her husband, which were provided by him to his second son ; albeit the clause of the contract was conceived in these terms, viz. ‘ Oblig-
‘ ing him and his heirs, to provide her to the liferent of the sums which he should
‘ conquer to himself or to his heirs ;’ which clause they found extended also

No 18.

A provision to a wife in a contract of marriage, of her liferent of all sums ‘ to be acquired by the husband, and taken to himself, and to his heirs,’ was found to comprehend the liferent of sums, the fee of which was provided to the second son.

No 18. to such sums as he had employed to his second son, and which was found prestable for her liferent by the heir, of these sums conquered to the second son.

Act. *Stuart.*

Alt. *Hope et Cunninghame.*

Clerk. *Hay.*

Fol. Dic. v. 1. p. 199. Durie, p. 178.

1629. February 10. OLIPHANT against FINNIE.

No 19.

An obligation to provide the wife in liferent of all sums conquest, was not extended to certain sums, which the husband had taken the debtors obliged to pay to some of his younger children, but only to those which he had acquired to himself and his heirs.

THE husband being obliged to provide his wife to a liferent of all sums to be conquest by him during their marriage; whereupon she having pursued the heir, to provide her to her liferent of some particular sums, contained in certain bonds, which the husband had taken the debtor obliged to pay to some others of his bairns, to whom the payment by the bond was appointed to be made, and which sums he had provided to the said bairns;—it was found, That that clause, and the like clauses contained in such contracts, could not oblige the heir to provide the relict to the liferent of sums, which, in the bonds and securities made thereupon, were provided to the defunct's other bairns: For such a general clause, in contracts made by the husband in favours of his wife, ought to be understood only of such sums as the husband acquires to himself and his heirs, and whereunto his heirs may succeed to him after his own decease; and whereof the fee remained in his person while he lived: For, if it should receive any larger interpretation, it would tend to take away all power from the husband, to provide any thing to his other bairns; but to acquire all which he had or might purchase to his eldest son only; yet to this it is *answered*, That the bairns provision is not affected with the wife's liferent.

Act. *Oliphant.*

Alt. *Nicolson.*

Clerk, *Hay.*

Fol. Dic. v. 1. p. 199. Durie, p. 423.

No 20.

Lands conquest, and sold again, do not fall under the clause of conquest in the contract of marriage. A feu being acquired, and disposed again to the feuar for a greater feu-duty; the feu-duty only is reputed conquest.

1629. November 26. LADY DUMFERMLINE against Her SON,

IN this action, whereof mention is made 12th March 1628, No 2. p. 3048. the clause of contract, whereby the husband is bound to infest the wife in all lands to be conquest, during the marriage, will not astrict the heir to fulfil the same to the relict, for such lands as were conquest by the husband, and after the conquest were sold by him, before his decease; for that clause ought only to be effectual to her, for such lands and conquest as remained and continued in that estate, the time of the husband's decease, and the right whereof remained with him. And it was also found, that the lands being acquired by the husband, from the feuar of the lands, and thereafter disposed again in feu to the same feuar, for a greater feu-duty to be paid, than was contained in the feuar's prior

rights, that augmentation of the feu-duty by the husband, could not be reputed a conquest, whereof the relict might claim a liferent, as coming under the fore-said clause in the contract. See No 24. p. 3072.

Fol. Dic. v. 1. p. 199. Durie, p. 470.

No 20.

1672. January 4.

BEATTIE against ROXBURGH.

By contract of marriage betwixt Roxburgh and Sandilands his spouse, Roxburgh is obliged to employ 3000 merks for her liferent use; and, by a posterior clause, provides her to the liferent of all lands conquest during the marriage. Shortly after the marriage, he conquest a land in Edinburgh; likeas he had another tenement before the marriage, out of which he infest his wife in an annual-rent, in full satisfaction of the contract of marriage; which infestment, she kept both in his lifetime, and after his death; but being on death-bed, he infest her of new in the tenement acquired after the marriage, bearing expressly, *for implement of the clause of conquest*. And she pursues now James Roxburgh, as lucrative successor to his father, by a disposition after the contract of marriage, to fulfil that obligation, to employ the 3000 merks.—The defender *alleged* absolvitor, *1mo*, Because the pursuer had accepted an infestment of an annualrent out of the tenement acquired before the marriage, in full satisfaction; *2do*, The two clauses in the contract of marriage, cannot import that the wife should have the whole lands conquest by the clause of conquest, and should return for the implement of the special clause, for employing the 3000 merks, upon the husband's heirs, or the tenement he had before the marriage; because the clause of conquest can only be understood of what was conquest, more than was answerable to the annualrent of 3000 merks; so that the last infestment granted to her by her husband, must necessarily satisfy both clauses, there being no other conquest. And albeit the infestment bear, to be expressly *in satisfaction of the clause of conquest*; that was but a voluntary gratuitous deed, that the husband was not obliged to by the contract, and was done *in lecto ægritudinis*; whereupon the defender has a reduction *ex capite lecti*, which he repeats by way of exception.—The pursuer *answered* to the first defence, That she never accepted or bruiked by the first infestment, that bears *in satisfaction*; and her intending of this cause is a renouncing of it; and to the second defence it was *answered*, That the clause of conquest extended to the whole conquest, and the husband might well, in implement, infest his wife in this tenement; neither has the defender interest to reduce this disposition, as done on death-bed, in prejudice of the heir, because he is not heir, but lucrative successor, which is only a passive title, but no active title.—The defender *answered*, That albeit primarily and immediately, it be the heir's privilege, not to be prejudged

No 21.

By contract of marriage, the husband bound himself to employ 3000 merks for his wife's liferent use, and by a posterior clause, provided her to the liferent of all lands conquest during the marriage. It was found, that this clause of conquest could only be understood of what was conquest, more than answerable to the annualrent of the 3000 merks.

No 21. by deeds on death-bed ; yet secondarily, it is competent to the creditors of the defunct, or heir, who are also prejudged by such deeds ; because, if the right stood in the heir's person, they could affect the same ; and it was so found in the reduction, at the instance of the creditors of Balmerino and Couper ; at whose instance, Couper's disposition on death-bed was reduced, albeit Balmerino was neither heir nor pursuer ; and there is no reason, that if an heir should forbear to enter, creditors should be prejudged. *See TITLE TO PURSUE.*

THE LORDS found, That the defender, as creditor in the sums whereupon the disposition proceeded, had interest to reduce the disposition ; and found the wife's second infestment reduceable, as being *in lecto*, in so far as it deborded from the contract of marriage ; and found, that thereby that infestment behaved to be interpreted in the first place, for satisfying the special obligation of employing the 3000 merks ; and that the superplus benefit of the tenement, if any was, was comprehended in the clause of conquest only ; and found no necessity to decide the first defence, concerning the acceptance of the first infestment, whether the wife's taking and keeping of it in her custody, did import the same.

Fol. Dic. v. 1. p. 199. Stair, v. 2. p. 34.

1688. July.

COLLINGTON against HEIR of COLLINGTON.

No 22.

A wife, by a contract of marriage, being provided to the liferent of what the husband should conquest, or, of what sums he should receive payment of during the marriage, was found not entitled to the liferent of sums conquest during the marriage, which had been applied by the husband for purging incumbrances upon his estate.

By contract of marriage betwixt my Lord Collington and his second Lady, my Lord having obliged himself to employ what he should conquer, or any sums of money he should receive payment of as due to him, and to take the rights and securities thereof to himself and his Lady, and longest liver, in conjunct fee ; and having renounced his *jus mariti* of thirty-six chalders of victual that stood in the Lady's person, which obligation she accepted in satisfaction of all she could ask or claim of jointure, terce or third, except the house or park of Collington ; the Lady after her husband's decease, pursued his son and heir, this Lord Collington, for a liferent of a great sum alleged conquest by the father, the pursuer's husband, arising from fees and pensions from the King, with which he had purged old wadsets and incumbrances upon his lands, upon these grounds, 1. That the money conquest must be reputed extant, in so far as the wadsets of the lands now redeemed, are surrogate in place thereof ; especially the Lady having quit her terce of the lands which are now freed, and which she would have fallen to, in case he, in contemplation of the said obligation of conquest, had renounced. 2. The case where a wife is competently provided by her contract, obligations of conquest do usually admit of some extension, for provisions to children of a former marriage, which is *debitum naturale*, and for rational deeds where no fraud appears ; yet that cannot be pleaded here, where the conquest is the wife's principal provision ; and it could not be esteemed a rational act, to take the conquest of the second marriage from the heirs thereof, and give it to the eldest son of the first mar-

riage. 3. The other alternative clause, ' or any sum of money he should receive payment of, &c.' clears the design, and is exegetic of the conquest; and all the pensions, salaries, &c. were received, and were due. 4. 'Tis the general rule, That all acquired during a marriage, and remaining at the dissolution thereof, or employed to satisfy debts of former marriages, should be reckoned conquest; and any special exceptions are not applicable to this case, and never allowed but when the wife is *aliunde* competently provided by her husband, and the disposal rational; neither of which can be here subsumed on Niddery's case, No 16. p. 3062., was among heirs of line and provision, and contained other specialities; what is here advanced may be confirmed from several decisions; March 14. 1623, Skene *contra* Forbes, No 1. p. 3045.; July 3. 1627, Lady Dunfermling *contra* her Son, No 10. p. 3054.; January 11. 1632, Lady Binning *contra* Hadden*; and June 27. 1676, Earl of Dunfermling *contra* Lord Callendar, No 7. p. 2941.

Answered for the defender: By the law and custom of this kingdom, nothing was conquest but what remained free at the dissolution of the marriage, and the husband being heir of the conquest, he might spend and debauch the same, and much more might he pay his debts contracted before the marriage, which is a rational and prudent deed; nor is conquest (which is but fortuitous, and often adjected as a compliment) to be considered so strictly as positive obligations. Again, nothing of the conquest was remaining; and *esto* the Lord Collington had cleared his old estate of debt, that was rational, and was not reputed conquest in Niddery's case, nor yet liable as *surrogatum*. 2. The Lady having the house and yards, and the liferent of the sums due the time of the contract, (which is considerable) and thirty-six chalders of victual by the first marriage, she is plentifully provided; whereas the defender hath a great family of children, and but a small fortune. 3. If the other clause, ' or to receive payment,' &c. had been exegetic, it had been a tautology; but it is a distinct positive obligation as to a conjunct fee of all sums then due to my Lord that he should receive, which are still in my Lord Huntly's hands never received. 4. My Lord Collington, the pursuer's husband, sold lands to the value of 10,000 merks, for the payments, and her portion was likewise employed for that end, though renunciations were always taken, and not assignations, the hazard of conquest not being apprehended: so that it cannot be presumed that the debt was purged with conquest-money; and to confirm what is advanced, decisions were also adduced; February 9. 1669, Cowan *contra* Young and Reid †, 1676, Littlejohn's case †; July 19. 1679, Morice *contra* Morice †; February 10. 1629, Oliphant *contra* Finnie, No 19. p. 3066.; July 15. 1673, Robson *contra* Robson †, No 4. p. 3050.; December 8. 1687, Frazer *contra* Frazer †; where the conquest of a second marriage employed for paying the debt of the first was sustained, though a considerable estate fell to the first marriage, which the husband had before the second marriage.

* Examining General List of Names.

† See PROVISION TO HEIRS AND CHILDREN.

No 22.

'THE LORDS assoilzied the defender;' upon which the pursuer appealed to the Parliament, where the decret was turned into a libel, and reviewed.' See APPENDIX.

Fol. Dic. v. I. p. 198. Harcarse, (CONTRACT OF MARRIAGE.) No 398. p. 105.

No 23.

A father had taken a disposition in favour of himself and his wife, in conjunct fee and liferent, for the wife's liferent, and to their son in fee, with a reserved faculty, to burden without the consent of either. Afterwards, he took a disposition to other lands, in favour of himself and his wife in liferent, and to their son in fee; whom failing, to the father's nearest heirs or assignees in fee. On the failure of father and son, the succession devolved on the heir of line, not of conquest.

1774. June 28.

GEORGE BOYD *against* JOHN BOYD.

A PART of the lands of Wester Crounerland, which some time ago belonged to William Fisher, holden of a subject superior, were, in 1718, conveyed by him to John Kid, by a disposition containing procuratory and precept; and John Kid was accordingly infeft base upon the subject.

Mr Robert Boyd, in the year 1733, purchased these lands from John Kid, and took the disposition to them, 'in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allenary, and to John Boyd their lawful son, his heirs or assignees, in fee,' under a faculty therein reserved to the said Mr Robert Boyd to burden the lands with any sum of money, without the consent of his wife and son.

Another parcel of the said lands of Wester Crounerland, which belonged to one John Scot, were, in the 1749, disposed by him 'in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in liferent, during all the days of their lifetime, and to Mr John Boyd their eldest lawful son, in fee; which failing, to the said Mr Robert Boyd, his nearest heirs or assignees whatsoever.'

The dispositions to both parcels contain procuratories and precepts; and Mr Boyd, his wife, and son, were infeft in virtue of those precepts, in the above terms.

John Boyd the son having predeceased his father and mother, and there being no other children, Mr Robert Boyd the father expedite a general service, as heir to his son; and, in the 1756, he obtained from the superior a charter and precept, to the purport following; The superior gives, grants, disposes, and for ever confirms, to and in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allenary; and in favour of the said Mr Robert Boyd, his heirs and assignees whatsoever, in fee, all and whole the lands, as described in the first disposition above noticed; and to which said disposition, so far as the same was competent to, or conceived in favour of the said John Boyd, now deceased, the said Mr Robert Boyd his father has now right, as heir served to him; and which lands were, by virtue of the procuratory of resignation contained in Fisher's disposition to Kid, and assigned by him to Mr Boyd, his wife and son, duly and lawfully resigned in his the superior's hands, in favour, and for new

infestments of the same, to be given and granted in favour of the said Mr Robert Boyd and Alison Douglas, in conjunct fee and liferent, for her life-rent use allenarly, and in favour of him the said Mr Robert Boyd, and his heirs and assignees, in fee, as heir, and come in place of the said John Boyd, his deceased son, conform to authentic instruments in the said resignation. After this, the holding and *reddendo* are mentioned; and, last of all, there is a precept for infesting Mr Boyd and his wife; upon which infestment followed.

Mr Robert Boyd died in the year 1766, leaving no issue; and upon the death of his widow, who liferented the whole, the lands, contained in the fore-said two dispositions, were claimed by John Boyd, the nephew of Mr Robert Boyd by his immediate elder brother, and, of consequence, heir of conquest to both Mr Robert Boyd and his son; and they were also claimed by George Boyd, the son of Mr Boyd's immediate younger brother, and, of consequence, the heir of line both of Mr Robert Boyd and his son.

George Boyd and his curators accordingly brought an action before the Court against John Boyd, the heir of conquest, concluding to have it found and declared, that the pursuer had the only right to the whole of the foresaid lands, and to be served and retoured heir therein; and that the defender had no right thereto.

The pursuer, in support of his claim to the *first* parcel, maintained, That, by the conception of the disposition 1733, the fee of the lands was vested in John Boyd the son; and that the father's general service, with the charter and infestment following thereupon, was sufficient to vest the right in the person of the father, as being a virtual confirmation of the base infestment in the son's person, and a precept of *clare* in favour of the father, as heir to the son; and as these lands became therefore heritage, and not conquest, in the person of the father, he having taken them up by succession to his son, the same does now devolve upon the heir of line, and not upon the heir of conquest.

With respect to the *second* parcel, it was *pleaded*; That the lands having been specially provided to the father and wife in liferent, and to John Boyd in fee, which failing, Mr Robert Boyd, his nearest heirs or assignees whatsoever, the heir-general of Mr Robert Boyd, *designative*, was entitled to take the succession, as heir of provision to John Boyd the son.

As to the *first* parcel, it was *pleaded*, on the part of the defender; That, if the fee was in the son by the conception of the disposition, it remained in *hereditate jacente* of him at this day; for that the charter of resignation, and infestment following thereupon, could carry no more than the blanch superiority, the procuratory in the disposition having remained unexecuted after the son's death; and as it was a *feudum novum* in the person of the son, and which, *quoad* the property, fell to be taken by a service, as heir to him, it behoved to devolve upon his heir of conquest, and not upon his heir of line.

No 23.

As to the *second* parcel, it was *contended*, That, as the same were conquest in the person of him to whom titles fell to be made up, the father's heir of conquest, and not his heir of line, could alone take up the succession.

THE LORD ORDINARY pronounced the interlocutor following: ' Finds, that, by the disposition granted by John Kid in the year 1733, the fee of his part of the lands of Wester Crounerland was vested in the deceased John Boyd; and that the titles, which were afterwards made up by Robert Boyd, his father, were insufficient to carry the property of the said lands, which must still be considered as *in hæreditate jacente* of John Boyd; and therefore, and in respect that the said land was a *feudum novum* in him, finds, that the property thereof does now devolve and fall to the defender, as heir of conquest to him; but finds, that the titles made up by Mr Robert Boyd, the father, were sufficient to carry the superiority of said lands; and being therefore to be considered as heritage in him, must, of consequence, devolve and fall to the pursuer, his heir of line: Finds, that, by the disposition granted by John Scot in the year 1749, the fee of his part of the lands of Wester Crounerland was vested in John Boyd, the son, and is to be considered as a *feudum novum* in him; but, in respect that the substitution in said disposition is not in favour of his own heirs whatsoever, but in the favour of the heirs whatsoever of Mr Robert Boyd, his father, which might have been different from the heirs whatsoever of the son, finds, that the pursuer, as heir of line to the father, is entitled to take John Scot's part of said lands, as heir of provision called by said substitution, and decerns and declares accordingly.'

Upon a report, the COURT unanimously (one Judge excepted, who had some difficulty with regard to the first parcel of lands, whether the taking this parcel in that way was not to be considered as a kind of *præceptio hæreditatis* in the son, and, therefore, this particular subject not to be considered as conquest, but as heritage *quoad* him, and as such to go to his heir of line) approved of the Lord Ordinary's judgment upon both points, and pronounced their own in the precise terms thereof.

Reporter, Colston.

Act. Baillie.

Alt. M^cQueen.

Clerk, Ross.

Fol. Dic. v. 3. p. 163. Fac. Col. No 117. p. 315.

No 24.

The Lords found, that where conquest lands have been sold, the *jus representationis* takes place upon the price.

1779. March 9. MARY RUSSEL and Others against JOHN RUSSEL.

RUSSEL of Arns, in his son William Russel's contract of marriage, disposed the lands of Arns to his son, and the heirs of the marriage. On the other part, the son obliged himself to take the rights and securities of the whole heritable and moveable conquest which he should acquire during the subsistence of the marriage to himself, and the heirs thereof; which failing, to his own

heirs and assignees. The marriage dissolved by the predecease of the wife, leaving issue two sons and four daughters. Both the sons, and one of the daughters, died without issue.

During the subsistence of the marriage, William Russel purchased some heritable subjects, and sold them *after* his wife's death. Subsequent to this sale, he executed a deed, by which he disposed his lands of Arns, and his whole effects whatever, to Agnes, his second daughter, in liferent, and to John Spiers, her second son, in fee, under burden of certain legacies to his other daughters. The deed declared, that these legacies should be in full satisfaction to them of all they could claim by their mother's contract of marriage.

Agnes predeceased her father, leaving several sons and daughters.

After the father's death, an action was brought by his eldest daughter Mary, and third daughter Jean Russel, for setting aside his settlement on John Spiers, and the other children of Agnes, as *ultra vires* of the granter; and for having it declared, that the pursuers were entitled to succeed to the real and personal estate of their father, in terms of the contract of marriage. The Court had no doubt in determining, that this settlement on the second son of the second daughter, which excluded the whole heirs of provision, was *ultra vires* of the granter, and that the succession to the subjects must be regulated by the contract of marriage.—The lands of Arns, therefore, which were *specially* provided to the heirs of the marriage, devolved, without dispute, on the pursuers, (the two surviving daughters), and the eldest son of Agnes, the predeceasing daughter, being the heirs-portioners.—As the conquest was likewise provided to the 'heirs of the marriage,' the lands conquest descended to the same persons. But it was disputed betwixt the parties, who were the persons under the marriage-contract entitled to take up the succession of the conquest moveables.

The pursuers insisted, that the moveables ought to be divided betwixt them, as nearest in kin, exclusive of the children of Agnes, there being no right of representation in succession to moveables.—The defenders contended, that, as the succession to the moveables in this case went to heirs of provision, and not to heirs *ab intestato*, it could only be taken up by service, and the *jus representationis* must take place. This general point was argued by the parties, but received no judgment; the necessity of deciding upon it in the present case being removed by the following speciality; that, though there was a moveable estate left by the father at the time of his death, this estate, *ex concessis*, arose solely from the sale of the conquest lands by the father after the dissolution of the marriage. On this ground,

Pleaded, separatim, for the defenders; That it is needless to enquire, who is the heir in the moveable conquest; for the whole of it must go to the heirs in the heritable conquest.—The father, no doubt, during the existence of the marriage, might have changed heritable subjects into moveable, and moveable into heritable, at his pleasure. But the dissolution of the marriage, by the prede-

No 24. cease of the wife, fixes not only the *quantum*, of conquest, but what particular subjects the respective heirs of the marriage are entitled to succeed to:—The heirs in heritage having right to succeed to such subjects as are then heritable, and the heir *in mobilibus* to such as are then moveable.

The dissolution of the marriage has the same effect as if special subjects had, from the beginning, been settled on these heirs by the marriage-contract. They have, from that period, a proper *jus crediti*; and, although they cannot insist for immediate possession of the subjects, yet, if the father dissipates the conquest, he is liable in warrandice. A sale of the subject made by him is valid to the purchaser; but he is bound to make good the damages suffered by that heir of provision who is hurt by the sale, and who would otherwise have succeeded to the estate.

If a subject, therefore, which was heritable at the dissolution of the marriage, is afterwards sold by the father, as in the present case, the heir in heritage is entitled, when insisting after the father's death for implement of his provision, to have the price or value of such estate re-funded to him out of the father's moveable or other subjects.

Answered for the pursuers: A provision of conquest has not, at any time during the life of the father, the same effect as a special provision.—It is considered as little better than a simple destination. The dissolution of the marriage fixes the *quantum* of the conquest in this respect, that the children can claim nothing acquired after that period; but the ample fee of the subject remains in the father. It is observed by Erskine, b. 3. tit. 8. § 43, 'That the conquest is computed *quoad* the father, not as at the time of the dissolution of the marriage, but of the father's death; November 27. 1684, Anderson against Anderson; February 24. 1685, Cruikshanks against Cruikshank; *voce* PROVISION TO HEIRS AND CHILDREN.'

But, although the dissolution of the marriage should be considered as fixing in general the *quantum* of the conquest, which the father is bound to transmit to the heirs of provision, it does not give an heir of conquest the *jus crediti*, which an heir of provision, in a special subject, is entitled to. In that case, the father being obliged to transmit a particular subject, if it is sold, or in danger of being carried off, the heir may, even during the father's life, do diligence, or bring an action against him for making the provision effectual in the event of his death.—But, in the provision of conquest, the father comes under no obligation to transmit any particular subject; and, therefore, if the conquest consist of a land-estate, the heir has no *jus crediti* from the marriage-contract to insist that this land-estate shall descend to him. The obligation of the marriage-contract is fulfilled, if the whole value of the conquest at the time of the dissolution of the marriage goes either to the heir in heritable, or the heir in moveable subjects conquest; and the father is always entitled, during his life, to vest his property in subjects of the one kind or the other, as he chuses.

The COURT found, ' That Robert Spiers, eldest son of Agnes Russel, has right to the same share of the conquest provided by William Russel's contract of Marriage that Agnes would have had, had she been alive ; and remit to the Lord Ordinary to proceed accordingly.'

Lord Ordinary, *Covington*.
Alt. *McLaurin*.

Act. *D. Rae, W. Bailie*.
Clerk, *Campbell*.

Fol. Dic. v. 3. p. 163. Fac. Col. No 76. p. 147.

How far the Husband is bound by clauses of Conquest ; *See* PROVISION to
HEIRS and CHILDREN.

See APPENDIX.

17 T 2

CONSIGNATION.

1738. February 1. ROBERTSON *against* CREDITORS of MATHIESON.

No 1.

A PURCHASER of land having granted bond for the price, which he could not directly pay, because of incumbrances; the seller, some terms thereafter, intimated to him, he would be ready to receive the price at Whitsunday then next; the money was accordingly offered at the term, but incumbrances not being purged, the purchaser took a protest for costs, skaith, and damage, and to be free of interest, in regard he was to consign the money, which he accordingly did, in the hands of a private banker. THE LORDS found him free of interest, though it was pleaded, there could be no regular consignment, except upon a suspension in the hands of the clerk, from whom the creditor has access to demand the money by authority of the Court. See APPENDIX.

Fol. Dic. v. I. p. 199.

1739. January 19. ARBUTHNOT *against* LOCKWOOD and GIBSON.

No 2.

A REAL creditor upon a bankrupt estate having agreed with the debtor to accept of a certain sum in full of his claims, the debtor consigned the money upon the creditor's refusing to hold bargain, and thereupon obtained an interlocutor in his favour, declaring the creditor's claims upon the estate extinguished.

Effect of consignment in case of arrestment.

In the mean time, during this dispute between the creditor and the debtor, certain creditors of the debtor arrested the consigned money, some before, some after this interlocutor; and in the competition among these arresters, notwithstanding it was alleged for the arresters after the interlocutor, that, till the said interlocutor passed, the consigned money remained the property of the consigner; the LORDS 'preferred the prior arresters,' the supervening interlocutor being considered only as declaratory.

Kilkerran, (CONSIGNATION.) No 1. p. 147.

No 3.

To which of
the parties
does the con-
signed money
belong?

1739. *June 26.*TUACH *against* M'KENZIE.

WHERE money is consigned by a reverser, it is considered to be the absolute property of neither reverser nor wadsetter, till the event of the declarator, but belongs conditionally to the one or the other, as the declarator shall proceed or not. Upon which principle it was found, that an arrestment of money consigned by a creditor of the consigner, did not so affect the consigned money, as to preclude the reverser from proceeding in his declarator of redemption.

A consideration of equity also here concurs, that it often happens that consigned money is not the property of the consigner, but is advanced by a friend in order to prevent the expiry of a reversion; and it would be very hard if that money could be run away with by the reverser's personal creditor arresting, so as to prevent the effect of his proceeding in his declarator of redemption.

Kilkerran, (CONSIGNATION.) No 2. p. 147.

No 4.

1780. *February 11.*CAMPBELL *against* SINCLAIR.

A PURCHASER of an heritable subject having called all the creditors of the seller in a multiplepounding, was desirous of consigning the price, which, till certain incumbrances were purged, and disputes among the creditors adjusted, he could not safely pay. THE LORDS found, That if he did consign, it behoved him to make a total consignment, and not a partial one. *See APPENDIX.*

Fol. Dic. v. 3. p. 164.

1794. *June 21.*The TRUSTEE for the Creditors of Robert Rae, *against* ALEXANDER GORDON.

No 5.

Consignation
in the hands
of a clerk of
court may be
proved by
witnesses.

IN an action at the instance of the Trustee for the Creditors of Robert Rae, before the Stewart of Kirkcudbright, against John Milligan, he was ordered to consign L. 46 : 14 : 3 in the hands of the clerk of court.

It being afterwards disputed, how far this order had been obeyed, Milligan contended, That he had consigned L. 41 with the depute stewart-clerk, but had retained the rest on account of a debt due to him by Robert Rae.

The depute stewart-clerk had by this time died bankrupt, but the principal stewart-clerk was made a party to the action, and Milligan offered to prove by witnesses, that the consignment had taken place. A proof before answer was accordingly allowed, from which the Stewart, satisfied that Milligan's averment was true, found him liable only for the balance which he had retained in his own possession.

The Trustee then brought an action against the principal Stewart-Clerk, for recovery of the money consigned with his depute, and the Stewart having found him liable, he presented a bill of advocation, which, having been refused by the Lord Ordinary, he, in a reclaiming petition,

Pleaded ; 1st, Consignation is a judicial act which can be proved only by the records of court. *Dict. voce* PROOF, p. 211.

2dly, At any rate, in this case, as relating to a payment of money, parole proof was incompetent, in so far as the sum claimed exceeded L. 100 Scots.

Answered ; 1st, The order to consign is a judicial act, but the consignation itself is a private transaction between the party who makes it and the clerk of court.

Parole evidence is in many cases rejected, because in them writing is commonly adhibited, and because it was in the power of the party to obtain written evidence. But when money is consigned, no receipt is ever given by the clerk. It is, indeed, generally marked in the diet-book, or on one of the steps of process. The custody of both is, however, entrusted to the clerk of court, who therefore must be answerable for the omission. If he should lose any material paper of a process, it would be competent to prove, by parole evidence, that it had been lodged, and for the same reason, the proof taken in this case, was competent.

Consignation is, in fact, the deposition of a certain subject for certain purposes ; and, it is a settled point, that deposition, whatever be the nature of the subject deposited, may be proved *prout de jure* ; *Dict.* p. 226.

2dly, The object of this action is not to establish a payment of money, but a claim of damages on account of malversation in office.

THE COURT, upon advising the petition, with answers, were clear that the Stewart's interlocutor was right, both on the competency of the proof, and merits of the question, and therefore unanimously ' adhered.'

Lord Ordinary, *Dregborn.*
Clerk, *Sinclair.*

Act. Da. Williamson.

Alt. Alex. Fergusson.

D. D.

Fac. Col. No 126. p. 283.

Upon whom lies the hazard of consigned money ? *See* PERICULUM.

Consignation in order to redemption. *See* REDEMPTION.

See Wolmet against Ker, No 10. p. 2557.

See APPENDIX.

CONSOLIDATION.

1542. July 1.

INNES against STEWART.

No 1.

The Lords found, that a servitude of thirlage being once consolidated with the property, cannot be understood to revive again, when any part of that property is alienated, unless it be so expressed.

ALEXANDER INNES claimt the thirle multures of the corns that grew certain years bypast upon the lands of Blairmondi, as due by the tenant thereof to James Gordon, who held the lands of the said Alexander, and the said multures of the corns that grew upon the lands of Baidinspyle, against James Stewart heritable tenant thereof, holden of the said Alexander, because the said Alexander was heritably infest in the haill forestry of Bony, with all the thirle multures of the lands thereof, and the lands foresaid ly within the said forestry. It was *excepted ex altera parte, quod non tenebatur eum solvere dicto Alexandro*, because they were heritably infest and immediate tenants to him of the lands foresaid in blench, paying one penny money *albæ firmæ tantum si petatur pro omni alio onere* that might be asked of these lands *vel occasione earum cum molendinis et multuris*; and, because the said Alexander's father, who annalzied, as said is, these lands reseruit not the thirle multures to his said new mill of the forest of Bony, therefore might not claim the same, because it is ane duty that is apchtand *ratione occupationis terrarum, et sic occasione earundem*. And the LORDS, notwithstanding diverse allegeances made in the contrare, by their sentence *definitive decreverunt* the tenants free of all the said Alexander's claim, and sua the seller of the lands man warrand it to them of all charges, but allenarly them that he makes and specifies in the alienation making. And sua *venditor warrantizat terras venditas emptori ab omni redditu et alio onere quocunque de dictis terris nisi aliter conventum sit, inter ipsos tempore alienationis*. And sua the LORDS fand that this thirle multure is *onus reale et servitus quod non venit in contractu nisi hoc dictum sit, et multuram remitti nisi contrarium sit conventum, et hoc virtute specialium clausurarum reservativarum prædictarum in chartis specificatarum*; and also, the said servitude *videbatur extincta eoque* after the said Alexander had coft the said multure of all the forestry, he got all the lands in heritage to himself, and sua the lands ought to have been thirled to himself, *quia res sua nemini servit et sic illa servitus semel fuit extincta et consolidata cum superioritate et proprietate terrarum earundem et per alienationem partis earum reviviscere non potest*.

Fol. Dic. v. 1. p. 200. Sinclair, MS. p. 38.

1566. February 8.

M'DOUGAL against CAMPBELL.

No 2.

A tacksman acquiring the property of the lands from the setter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party.

UTHRED M'DOUGAL of Garthland, heir of line to the Laird of Corswall, warned Alexander Campbell, bastard son to Corswall, to remove from certain lands pertaining to him as heir to Corswall. *Alleged*, That he had tacks of them to run, set to him by his father, which the pursuer, as heir, should warrant to him. *Replied*, He ought not to warrant these tacks to him, because after the date of his tack he had taken heritable infeftment of the same lands, whereby he had past from his tack. *Duplied*, His infeftment was reduced and decerned to have no faith, in respect whereof, his tack should stand in force to him. Which allegiance was found relevant, and the pursuer debarred from removing of the defender, *quia quem de jure tenet evictio, eundem ab agendo repellit exceptio*.

Fol. Dic. v. 1. p. 200. Spottiswood, (DOMINIUM.) p. 84.

*** Maitland reports the same case :

ANENT the action pursued be Uthred M'Dougal of Garthland, aire of line to the Laird of Creswell, against Alexander Campbell, bastard son to the said Laird ; the said pursuer warned the said defender to remove fra certain lands pertaining to him, as aire to the Laird of Creswell. It was *alleged* be the defender, That he had tacks of the said lands made to him be the said Laird his father, and years thereof to run ; wherefore, the said pursuer, as aire foresaid, should warrant to him the said lands. It was *alleged* be the pursuer, That he sould not warrant the same, because after the date of the said tacks, the said defender had taken heritable infeftment thereof, and thereby he past frae his tacks be reason of his infeftment heritably. It was *alleged* be the said defender, That the said infeftment was reduced be the LORDS of Council, and found be their interlocutor and decreet, to have no faith, in respect whereof, his tacks should stand in effect, and he had guid action to pursue warrandice thereupon ; whilk allegiance was admittit, and fund be interlocutor, that the said pursuer should warrant the said lands, conform to the tack, notwithstanding the allegiance foresaid of the pursuer.

Maitland, MS. p. 172.

*** See No 5. p. 3084;

1610. February 23.

LD of CAUDER against Mr JA. HAMILTON.

No 3.

Found as above.

A MAN who has tacks of land, taking thereafter an infeftment of fee of the same land, with a reservation of another man's liferent, his infeftment will not take away his tack, but he bruik the lands during the years of the tack, and maintain his possession by virtue of the same against the foresaid liferenter du-

ring all the years of his tack, for payment to the liferenter of the duty thereof, notwithstanding his infestment of fee.

No 3.

Fol. Dic. v. 1. p. 200. Haddington, MS. No 1821.

1624. July 3.

E. ANNANDALE *against* JOHNSTON of Betock.

IN an action of removing, pursued by E. of Annandale, against Johnston of Betock, the defender having compeared, who had acquired the right of the lands from one ——— Graham of Thornik, heritor of the lands controverted, from whom he had acquired double infestments; one holden of the said ——— Graham of Thornik's self, and another of the King, upon Thornik's resignation, in the King's hands; upon which resignation the defender was infest, holding of the King; this infestment granted to be holden of the King, to the defender, is reduced, and also decerned to make no faith, at the pursuer's instance, the defender compearing; after which sentence, this removing being intended, the defender compeared, and defended himself, with the other base infestment, granted to him, to be holden of Thornik. *Item*, He defended himself, that he bruiked by right, or by tolerance of the said Thornik his author, who was neither called in that first reduction and improbation, nor was his right in that process drawn in question, but subsisted as a good right, untaken away; both which defences were repelled by the LORDS; for they found, that the defender could not have recourse to the base infestment holden of Thornik, seeing the same was absorbed by the public right given to the defender, upon his author's resignation, after the accepting of which public right, the other was extinct, and the defender could not return thereto, neither could he defend himself with his author's right, as if the same were good; and that it was not reduced nor called for in that process, seeing no right remained in his author's person, he being lawfully denuded in the defender's favours; and the defender thereupon infest, which infestment being reduced against the defender compearing, he could never have recourse to cloath himself with his author's right, which he alleged not in that reduction, and so prejudged himself therein, suffering his own right, which depended thereon, to be reduced, by compearing; likewise, he being once heritor, upon his author's resignation, there remained no right in his author's person, which could furnish any defence to the excipient, as if he bruiked by his tolerance, for the accepting from him of an heritable right, barred him from alleging that he was his tenant, seeing he to whom he alleged himself tenant, retained no right in his person, neither of property nor superiority. This decision is remarkable; for Thornik's own right was never impugned, and so the defender's own oversight imported this decision, and was the only cause thereof, seeing he omitted to propone the same, which seeing he compeared, he might have done, and eschewed thereby the sentence of reduction and improbation; and it might appear, that albeit the infestment given to the defender, holden of

No 4.

A man having acquired double infestments, as is usual, and having taken infestment public by resignation, to be holden of the superior, and that infestment being thereafter reduced at the instance of a third party; the Lords found that he could not return and defend himself in a removing by the other base infestment, but that the public one made the base to cease.

No 4.

the King, was reduced, and decerned to make no faith, yet that he might have defended his possession with the base infeftment holden of his author, or that he was tenant to him, his author's infeftment being good in itself; for that sentence of reduction would appear to prejudge him no more than if the defender had renounced that public infeftment, *quo casu* he could not have been hindered to return the other, or to allege himself tenant to his master, who had a right. But the LORDS found the contrary, that the public infeftment made the base to cease.

Act. Hope.

Alt. Aiton et Oliphant.

Clerk, Scot.

Fol. Dic. v. 1. p. 200. Durie, p. 136.

1628. March 12.

E. DUMFERMLINE against COUNTESS.

No 5.

A TACKSMAN acquiring the property of the lands from the letter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party. See No 2. p. 3082.

Fol. Dic. v. 1. p. 200.

* * * See This case voce TACK.

1634. December 11.

L. LESMORE against HUTCHESON.

No 6.

A tacksmen acquired a wadset of the lands. His right of wadset was set aside. He was found entitled to defend himself upon his tack against the donatar of the letter's liferent escheat, who had reduced his infeftment as granted in *cursu rebellionis*.

L. LESMORE, younger, being constitute assignee, by the L. Caprington, donatar to old L. Lesmore's liferent escheat; after general declarator, in an action of special declarator, he pursues one called Hutcheson for payment of the mails and duties of the lands of ——— pertaining to the rebel; and the defender defending himself with a tack of the lands, set to him by the rebel before his rebellion, the pursuer replied, that he had passed from that tack, in so far as, since the date thereof, he had accepted an heritable infeftment of these lands from the rebel, he then being rebel unrelaxed, whereby the tack became extinct; so that he cannot have recourse thereto; and therefore the heritable right being acquired thereafter, at the which time he being rebel, and not relaxed within the year, he could not dispoise the lands within the year, the rebellion being *in cursu*; so that whenever the year of his author's rebellion expired, his liferent of the lands must belong to the superior, and the same cannot be excluded by returning to the tack, which was absorbed by the heritable posterior wadset. And the defender *duplying*, That seeing the wadset is not a valid right to him, whereby to bruik, he may lawfully return to that right whereby he did bruik; for if his heritable infeftment were reduced, or that another had acquired a better right, which would give him preference to the lands before the excipient's right, *hisce casibus* his heritable right falling, he might return to his tack, and

could not be prejudged therein : Even so in this case, the LORDS sustained the exception, notwithstanding of the reply, and found that the excipient might return and clothe himself with the foresaid tack, notwithstanding of the acceptation of the said heritable right ; albeit the rebel, who was the defender's author of his heritable right, was at the horn the time of the acquiring of the said heritable right, and that he was never relaxed within the year ; for, seeing he could not bruik by virtue of that heritable right, in respect of the said rebellion, it was found that it could not extinguish the prior tack, but that he might return and clothe himself therewith. This decision wants not its own doubt ; for it appears, that it is hard to make the tack convalesce, for that reason, that he could not bruik by virtue of the wadset ; for, if the heritable right be good and valid in law, there is no reason wherefore he should return to the tack again ; and albeit the author thereof was then rebel, yet that makes not the heritable right to fall, but suspends the same during his lifetime, by reason of the rebellion, which, in effect, is a confirmation of the heritable right to this excipient, and not an everting of that heritable right, for they might subsist together, viz. that the liferent should pertain to the donatar, and the fee to the excipient ; whereas the tack and the heritable right cannot both subsist in one person ; and if the defender should take him to the tack, now after he had purchased an heritable right, it may appear that thereby he passes from the heritable right, by using a more base and ignoble right, and so cannot return to a more noble right thereafter, having made choice to bruik by a definite temporal right. Likeas it is his own fault that he obtained not his author relaxed, whereby he might validly have obtained from him that heritable right, *et sic non debet lucrari ex sua culpa*, and to the prejudice of the King, who, by his vassals annual rebellion, cannot be prejudged of the casualty of the liferent escheat thereby accrescing to him, *et sic reus sibi imputet*, who provided not better for his own security ; and it may be, and is very probable that it was so, that when the defender acquired the heritable right, the parties agreed, that, upon consideration of the tack, the wadset was granted upon more easy conditions, and that there was allowance given to the excipient in the said wadset, in regard of the tack, whereby it is in effect extinguished ; and as the tack could not be obtruded to the setter's self, after the heritable right, albeit the heritable right had not given him a valid title to the land, far less can it be obtruded to the King and his donatars ; and as if either the tack had been directly *et specific* renounced by the tacksman, or that there never had been a tack set, the liferent would have fallen ; even so in this case, as it now stands, where in effect, by the posterior wadset, the tack, if not *per expressum*, yet *tacite* is renounced, and passed from ; but it was decided *ut supra*, and these arguments were not proponed.

Fol. Dic. v. 1. p. 202. Durie, p. 740.

1670. *January 29.*The Laird of RENTOUN, JUSTICE-CLERK *against* HOME, Portioner of Westrestoun.

No 7.

There being a servitude upon a whole abbey pres-table to the forester, he having the lands himself, and disposing or excambing the same without reservation of the servitude, the Lords found the lands free thereof.

IN a declarator at the Justice-Clerk's instance, as having right to so many threaves of corn and straw out of each husband-land of the abbay of Coldingham, as heir to — Ellums, who were foresters to the abbacy; there was a defence proponed for Home, That his lands of Westrestoun were given in excambion with the pursuers predecessors, for certain lands which were a portion of Rentoun, and that without reservation of any such servitude. It was *replied*, That these lands of Rentoun being liable to that servitude before the excambion, *ex natura rei*, the lands of Westrestoun, which were excambed, behoved to be liable to that same servitude as these lands of Rentoun were. — THE LORDS having considered the contract of excambion, and charter following thereupon, which did bear, that the pursuers' predecessors, who did excamb these lands of Westrestoun, had disposed the same to be holden blench, *reddendo denarium pro omni alio onere*; and that, when these lands belonged to the Lairds of Rentoun, who were foresters, they could not be liable to that servitude, *quia res sua nemini servit*, they found the allegiance relevant and proven, and therefore assoilzied the defender.

Fol. Dic. v. 1. p. 200. Gosford, MS. p. 97.

No 8.

1687. *July 23.*

ELIES, Supplicant.

MR JOHN ELIES having infeft his son in Elieston, to be holden base of himself, and being now dead, and so his son succeeding also to him as heir of tailzie, and serving himself heir, he doubted how to be infeft, being both superior and vassal, and if he could direct precepts to infeft himself? On a bill given in to the LORDS, they directed precepts to the Sheriff of the shire to infeft him. But thereafter the LORDS found he needed no new infeftment, but that his old one reconvalesced, and his retour consolidated the property with the superiority without a sasine.

Fol. Dic. v. 1. p. 200. Fountainhall, v. 1. p. 470.

1736. *February 4.*CHARLES, EARL of PETERBURROW *against* The CREDITORS of SIR PETER FRASER of Duris.

No 9.

A wadset, purchased by an heir of entail, the reversion of

SIR ALEXANDER FRASER having purchased the estate of Duris, comprehending the lands of Strachan and Culpersheugh, entailed it under the usual prohibitory

and irritant clauses : After his decease, it descended to Sir Peter Frase rhis eldest son, who contracted a great many debts ; and, upon his demise, it again devolved to Charles Earl of Peterburrow, as the next heir of entail, who insisted for reducing the debts contracted by Sir Peter, as having no power to charge the estate with any burdens other than what were contained in the tailzie.

The defence offered for the Creditors was, That Sir Peter had an interest in the lands of Strachan and Culpersheugh, subject to no limitations or conditions whatever, which, from the rights produced, was instructed in the following manner, viz. it appeared, that the Earl of Marshall, *anno* 1642, conveyed these lands, by way of proper wadset, to Sir Thomas Burnet of Leys, redeemable upon payment of 57,090 merks, wherein he was publicly infeft ; and that the Earl of Marshall's creditors had apprised his estate *anno* 1650, whereby they carried a right, not only to the estate of Duris, but to the reversion of the lands which had been wadset to Sir Thomas Burnet.

Further, it appeared that Sir Alexander Fraser, *anno* 1666, did purchase the estate of Duris, comprehending the above reversion, from the Earl of Marshall's Creditors, with his concurrence, which he entailed in the 1667 and 1669 in manner as above set forth ; and likewise, that Sir Alexander had acquired a right to some securities on the said wadset, whereby, when Sir Peter came to succeed to the entailed estate, there remained only outstanding on the wadset the sum of 27,090 merks, which he having paid, obtained a disposition thereto, *anno* 1687, from the heirs of the wadsetter. This right or interest in the wadset, so far as extended to the sum paid by Sir Peter, the Creditors *contended*, was affectable for his debts ; seeing, from the above state of the facts, it was plain, that Sir Alexander, at the date of the entail, had no interest in the wadset lands other than a right to redeem ; so that the clauses in the entail could not affect any greater interest in the estate, than what belonged to the maker thereof. And the act 1685, the proper basis upon which all entails do stand, refers particularly to lands in the right of the tailzier, at the date of the tailzie. *2do*, The clauses in the entail are conceived so as to affect what belonged to Sir Alexander himself, being chiefly limitations upon his heirs ; wherefore the words can reach no farther than such lands and estate as they were to take by descent from him. *3tio*, There appears nothing in this case to hinder the wadset-right, acquired by Sir Peter, to go to his heir of line, and the tailzied estate to the heirs of tailzie. And, as he did not extinguish, but take a formal right thereto, differing in substitution from the entail itself, it cannot be construed to give any additional force to the entail ; especially as the entailed subjects are not put in a worse condition by the creditors having access to affect this purchase.

For the Earl of Peterburrow, it was *answered*, The nature of a reversion is such, that, when the redeemable right comes to be paid off, the full property is in the reverser ; and there is an end of the redeemable burden : So soon, therefore, as Sir Peter paid off the wadset, the full estate was in him, from that time, in the same manner as if it had never been granted ; and, in this case par-

No 9.
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No 9. ticularly, as Sir Alexander, when he purchased the reversion, became bound to pay the wadset-money, by relieving the Earl of Marshall of the requisition, the wadset-sum was a debt upon him, part of which he cleared in his own time, excepting the 27,090 merks paid by Sir Peter; and which, by a clause in the tailzie, whereby the heirs are obliged to pay the tailzier's debts, he might have been compelled to pay; of consequence, the payment behoved to operate in extinction of the debt, more especially as he did not keep it up by taking a conveyance to a trustee, but took it directly to himself, the reverser, whereby the estate was as much disburdened of the wadset, as it would have been of any adjudication or heritable bond that he had paid. And, supposing it should be considered as an acquisition, yet, in that view, it as effectually accresced to the estate as if he had purged off any other incumbrance whatsoever; if it were otherwise, several odd consequences would follow. Thus, for instance, all the incumbrances, where the heirs of line and heirs of entail are different, behoved to descend as separate estates, the one to the heirs of line, and the other to the heir of tailzie. In the *next* place, although it is not alleged, that any of the debts were contracted to pay off the wadset; yet it is now pleaded, that they must affect it; because Sir Peter disburdened the heir of entail of so much debt, as the estate is thereby in no worse case than it was at the date of the tailzie. But, at this rate, supposing Sir Peter had paid the debts out of the rents of the estate, as probably he did, and so paid it out of what were the effects of Sir Alexander; yet, nevertheless, it must remain a burden upon the estate against the succeeding heirs of entail; the consequence whereof would be, that no entailed estate, where there are any debts affecting it at the time of the entail, could ever be effectually disburdened; for, if an heir of entail thinks fit to extinguish debts affecting the estate, if he does not make a new entail; then either he, or any subsequent heir, at the distance of whatever period, (for this matter admits of no prescription), might charge the estate with as much debt as did affect it the time of the entail; because, according to the Creditors' reasoning, such contractions do not put the estate in a worse case than it was at the date of the tailzie; if this be law, it would make a record of debts, that affect a tailzied estate at the date thereof, full as useful and necessary as the record of entails.

Replied for the Creditors; The clause in the entail, whereby Sir Peter was bound to pay the tailzier's debts, cannot be extended to the redeeming of wadsets, which are proper heritable estates in the wadsetters possessing the lands, by virtue of redeemable dispositions; which, though they contain a clause of requisition, yet, until that is made, they cannot come under the notion of debts. As to what is *urged*, That a wadset is of the nature of an heritable bond or adjudication, which, if Sir Peter had paid, could not thereafter remain a burden on the entailed estate, being extinguished *confusione*; it is *answered*, *imo*, That it cannot be admitted, even supposing the purchase had been of an heritable debt granted by the maker of the entail, that this heritable bond, convey-

ed to Sir Peter and his heirs or assignees, could not have been affected for his debts; seeing there is no law that declares such acquisition should become *ipso facto* extinguished; especially if a conveyance, and not a discharge, was taken thereto; but when it is considered, that the right in question is a proper wadset, and not an heritable bond or adjudication, the argument is still stronger; as these are extinguishable by possession, which a proper wadset is not; nor is there the least foundation for presuming that the wadset was paid out of the rents of the estate. *2do*, It may be true, that, when a person who is debtor acquires a right, it will, in some instances, be extinguished *confusione*; yet, in others, the confusion does only operate a temporary suspension of the effect of their right, *e. g.* if two separate estates are sprung from the same subject, and happen both to centre in one person, this does not itself *eo ipso* sopite the two estates, so as they may not descend thereafter to different heirs, or that one may and the other may not be affectable for the debts of the heir for the time being; nor does it make any difference, that Sir Peter did not take the conveyance in the name of a trustee; seeing it would have belonged to him just as much in that shape, as in the way it was taken; and consequently equally liable to be affected.

THE LORDS found, that the wadset was affectable by the Creditors to the extent of 27,090 merks.

Fol. Dic. v. 1. p. 201. C. Home, No 9. p. 26.

1736. July 6. EDGAR against JOHNSTON *alias* MAXWELL.

No 10.

A right may be completed upon any one of two titles competent.

AN estate being disposed to an eldest son in his contract of marriage, and to the heirs-male of his body, which failing, to the heirs-female of his body, the said eldest son, after the father's decease, neglecting to infest himself upon the disposition in the contract, made up his titles as heir of the investiture; again, after his decease, his son made up his title also as heir of the investiture, and thereupon made a gratuitous conveyance of the estate. The heirs-male of the marriage having failed in him, the heir-female was served heir of provision in general upon the contract of marriage, and thereupon claimed the estate upon this *medium*, that the gratuitous dispositive can be in no better situation than the heir general, or the heir of investiture, who would be bound by the deed of his predecessor, granter of the disposition, in the contract of marriage. It was *answered*, That the disposition being in favour of the apparent heir, was absorbed by his making up titles to the estate as heir general; and it would be an useless form to oblige him to infest himself over again, upon the disposition in the contract, or to oblige his son to serve heir of provision to him in general, in order to carry the provision in the contract, which would not make the estate more amply theirs than it was by their making up titles as heirs of the investiture.—THE LORDS repelled the allegiance, that the right of the contract of marriage

No 10.

was not established in the person of the heir, in respect of the answer, that the real right of the estate was established in this person.

Fol. Dic. v. 1, p. 200.

* * * Kilkerran reports the same case :

THE estate of Elshieshiells, which, by the investitures, stood provided to heirs male, was, in the year 1684, disposed by John Johnston of Elshieshiells, in his son Alexander's contract of marriage, to Alexander and the heirs-male of that marriage ; which failing, to his heir-male of any other marriage ; which failing, to the heir-female of that marriage ; and there being no provision in this contract, that Alexander the son should only enjoy the estate by virtue of that title, he, upon his father's death, made up his titles by special service to his father as heir-male, and was thereupon infeft.

It happened that Alexander had only a daughter of that marriage, mother to Theodore Edgar ; but having married a second time, he had two sons of this last marriage, the eldest whereof made up his titles to the estate by special service as heir-male to his father ; and on his decease, without issue, the second son made up his titles by service as heir-male to his brother, and being infeft, disposed the estate *gratuitously* to James Maxwell, younger of Barncleugh, his brother-uterine.

Upon the death of the said second son, also without issue, Theodore Edgar, grandchild to Alexander, by his daughter of his first marriage, purchased briefes for serving himself heir of provision to his grandfather Alexander, by his fore-said first contract of marriage, in order to set up a claim to the estate ; which the said James Maxwell having opposed, upon report of the assessors the LORDS found, ' That the son of the second marriage might *gratuitously* alter the destination in the contract of marriage ; and repelled the objection, that the right to the provision in the contract of marriage had not been established in the person of Alexander Johnston ; in respect of the answer, that the real right to the estate was established in the said Alexander's person.'

Where one has it in his power to make up his right to an estate by either of two titles, *v. g.* upon the destination in his contract of marriage, or upon the ancient investitures of the estate, and is under no restraint which of the two he shall chuse ; if he chuse to make up his titles on the one, *v. g.* upon the ancient investitures, and conveys away the estate, as in this case, no subsequent heir can take up the estate upon the provision in the contract of marriage, and thereupon quarrel that conveyance.

Kilkerran, (CONSOLIDATION) No 1. p. 148.

See APPENDIX.

CONSUETUDE.

SECT. I.

Habite and Repute a Notary, Messenger, &c.

1553. May 6.

CUNINGHAM against SEMPILL.

ANENT the action pursued be Hew Cuningham against Lady Sempill for improving of ane instrument whilk was produced before the Lords, the most part of the witnesses insert died, and but two of them on life, who were called before the Lords, together with the notar, sworn and examined; the said notar first denied the said instrument, whilk was producit before the Lords, and upon the morne came and approvit the same, ane of the living witnesses, (denied) the said instrument, and the other approved the same. And also, it was *alleged* be the said Hew, for improving of the said instrument, That the said notar gave the same lang before he was made notar, as was clearly proven be his instrument of creation shown and produced. It was *replied* be the other party, That he was holden be the hail country notar; and, to that effect, produced diverse and sundry instruments, for diverse parties, made be the said notar lang before the said instrument producit be the said Lady.—The said Lords being advised with the said notar, fand, be interlocutor, the said instrument good, and not improven, but to have faith, notwithstanding the foresaid things alleged in the contrare.

Fol. Dic. v. 1. p. 201. Maitland, MS. p. 117.

1608. June 4.

SOMERVILLE against JARVISWOOD.

IN an declarator pursewed be Somerville against Jarviswood, it being *allegit* That the horning was null, because the messenger, executour and denuncer, was depyvit; it was fand be the Lords, that the defender behoved to offer him to prove, that the deprivation was lawfullie publishit at the mercat croce of the head burgh where the officer dwelt.

Fol. Dic. v. 1. p. 201. Haddington, MS. No 1448.

17 X 2

No 1.

A bond was subscribed by two persons whereof one was not a notary, yet because he was *tentus, habitus, et reputatus* a notary, it was sustained.

No 2.

An execution being quarrelled, because the messenger was deprived, this was found not relevant, unless the deprivation was published at the market cross of the head burgh where the messenger dwelt.

1610. *January 10.*SPENCE *against* REID.

No 3.
Found as
above.

SPENCE pursued the Executors of umquhile John Reid to pay the annualrent of eleven merks yearly, of all years since the year 1595, conform to a bond, by the which the said umquhile John Reid, as cautioner for his bother, was bound to have paid to Spence's mother, the sum of 110 merks, before Martinmass 1595; and, failing thereof, to infest her and her heirs in an annualrent of eleven merks yearly, and to pay as well not infest as infest. In the which cause, the LORDS found, that a party bound by an heritable bond, not having any heir, and not being of that quality that he might have any heir, that the party, to whom he was bound, ~~had sufficient action against the defunct's executors~~, for fulfilling of the said heritable bond. Next, it was excepted, that the bond was null; because it was for an heritable annualrent, and was not subscribed by two notaries and four witnesses, but only by Stephen Ballentine notary, and John Moscrop co-notary, and three witnesses, it being true that Moscrop was no notary, but was hanged for behaving himself as a notary, he not being a notary; albeit, it being provided by act of Parliament 1579, that all writs, importing heritable infestment, shall be subscribed by two notaries, in presence of four famous witnesses, otherwise to be null. Notwithstanding whereof, my Lord Chancellor, President, and the most part of the Lords, sustained the bond, in respect of the smallness of the matter, and that Moscrop, co-notary, was *tentus habitus et reputatus*, albeit there were but three witnesses inserted.

Fol. Dic. v. 1. p. 201. Haddington, MS. No 1739.

No 4.

A sasine within burgh was sustained tho' granted by one who was not town-clerk, and though there was another, in regard the giver was habite and repute town-clerk, and was in use to give sasines.

1615. *July 15.*DOUGLAS *against* CHEESLIE.

IN an action pursued by Geo. Douglas of Bonjedburgh *contra* Marion Cheeslie, the LORDS repelled the exception founded upon the act of Parliament 1567, anent sasines to be given within burgh by the town-clerk, in respect of the reply, that it was offered to be proven that Mr George Douglas was repute and holden to be town-clerk, and in use to give sasines; and that, notwithstanding, they offered them to prove, that there was another town-clerk.

Fol. Dic. v. 1. p. 201. Kerse, MS. fol. 77.

1676. *November 10.*STUART *against* HAY.

No 5.

An execution by a deposed messenger was sustained, he being

THE deceast Francis Hay of Gourdie grants a bond in these terms, ' that his estate being very ancient in the name of Hay, and burdened with debt, for the preservation thereof, he obliges himself not to contract debt, nor to dis-

' pone without the consent of two of three persons named, or their heirs being ' majors for the time,' which bond is dated in anno 1650: Thereafter in anno 1664, William Stuart takes a wadset of a part of his lands, and thereafter buys the reversion, the communing betwixt them having begun ten months before the bargain. Inhibition is raised upon this bond, and registration also about ten months before the disposition. Stuart raises reduction and declarator, that this bond should not be prejudicial to this bargain, on these reasons; 1^{mo}, Because the only legal remedy against weakness or levity is, that the Judge Ordinary *causa cognita* gives interdictors, who are *curatores prodigo*, which being published and registrate, all deeds done without their consent are null, except in so far as *in rem versam*; and though by our custom, interdictions have been sustained *sine causa cognita*, because it is presumed, the Lords, by granting of the publication, had evidence of the weakness, yet they have always been reduced, unless the levity were proven; but here there is no mention of levity, but a design to perpetuate lands in the same family; neither is there any interdiction or publication, but only a private bond and inhibition thereon; and albeit such inhibitions are effectual upon clauses restrictive in favour of third parties, or heirs of tailzie, yet when they terminate upon the person restricted, and his heirs of line, he becomes both debtor and creditor in the obligation, *et confusione tollitur*. 2^{do}, Though this was a formal interdiction, published and registrate, yet *deceptis non decipientibus jura subveniunt*, against which minors are not restored; but here there was fraud, in that this bond was kept up 14 years, and after the pursuer had made his bargain, and searched the registers, the inhibition was execute and registrate, and one of the interdictors, procurer of the inhibition, is witness to the bargain, and receiver of a part of the price. 3^{tio}, The messenger, executor of the inhibition, was exauctorated by the Lyon, and his deposition published. It was answered, That our custom hath justly and constantly allowed voluntary interdictions upon just grounds, such as the preservation of a family; and though here levity be not exprest in plain terms, yet it is sufficiently insinuate, that that person needed the help and advice of friends to preserve his family, and the weakest or wilfullest persons will not be willing to declare themselves expressly such, but must be dealt with upon gentler narratives, and there is nothing more ordinary than that instead of publication, to use inhibition. And as to the matter of fraud, or the interdictor's consent, there is nothing relevantly alleged; but it is most rational that the interdictors should forbear to publish the interdiction till they have need; but when they saw the communing begin, it was fit that they should have interrupted it, and therefore the interdiction was registrate ten months before the subscription of the bargain, neither could the fraud or consent of one of the interdictors prejudge the weak person, who could only be authorised by the express consent of two; and for the messenger, he was holden and repute such, and was in the actual exercise of his office at that time, and the lieges are not obliged to notice Lyons' sentences,

No 5.
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No 5.

even though published, but he should effectually hinder any to exercise that office who are not authorised.

THE LORDS found the defence relevant to sustain this inhibition as an interdiction, that the person interdicted was commonly known to be insufficient to manage his own affairs through weakness or prodigality, *ad hunc effectum* only to preserve him against deeds done to his enorm lesion; but admitted to the pursuer's probation, that his bargain was profitable to the behoof of the interdicted person, and allowed all witnesses and other evidences to be adduced for proving thereof, and would not restrict the pursuer to a full and regular probation thereof; and found it sufficient that the messenger was officiating at that time, and holden and repute as a messenger. See INTERDICTION.

Fol. Dic. v. 1. p. 201. Stair, v. 2. p. 461.

* * * Gosford reports the same case :

IN a reduction at the instance of William Stewart against John Hay of Gourdie, who was heir to Francis Hay who had granted a bond in anno 1650, bearing, For as much as he was a person of weak judgment and ready to be imposed upon, and that he and his predecessors had been heritors of the lands of Gourdie for many years; and being resolved not to contract debts, nor burden the same, but by the special advice of Mr David Kinloch, John Kinloch, his brother, and George Nairne, therefore he did oblige himself not to contract debt, but by their special consent, or any two of them, the said John being *sine quo non*, whereupon they raised letters of inhibition, and execute the same 14 years thereafter, at the market-cross of the head burgh of the shire; after which, the said William Stewart having obtained a wadset of the said lands for sums of money, he caused the said bond and inhibition to be reduced, so that it should not affect his wadset, upon these reasons: That the said Francis being major, *sciens, et prudens*, no private bond granted to his own friends who were not creditors, could hinder him to contract debts and grant wadsets for security, they having no interest and there being no mention of heirs in the bond. 2do, The letters of inhibition raised and execute, not bearing the special terms of an interdiction, declaring him incapable, either as a prodigal or as a person that had no judgment or wit, could not be sustained in our law to incapacitate him from contracting debt, or granting real rights for security to the creditors, without which they were in *bona fide* to contract with him and accept of a real security. It was answered to the first, That the narrative of the bond was opined, bearing, for as much as he was unfit to manage that estate, which was ancient; and that it might be transmitted without burden, it necessarily imported, that it should be preserved to his heirs, that they might succeed thereto; and so he ought to be preferred upon that ground of law, *qui sibi providet etiam et heredibus*, who shall represent him. It was answered to the second, That

the letters of inhibition and executions were opposed, which bearing that they were raised upon the said bond, and thereupon did publicly inhibit him from doing of any deed which might affect the estate, was in effect a clear interdiction; and albeit, they did not bear that word *interdicts*, yet, bearing, that they did inhibit, was as binding as letters of inhibition and interdiction, bearing, *parest termini et univoci*; and, if this were not sustained, it would open a door to many persons to prey upon successors to ancient estates to destroy the same; the taking the advantage of the weakness of the present successor, who was known to be unfit for management, it was clear in this case. THE LORDS did much reason among themselves upon the relevancy of the reason of reduction, and answers made thereto; some being moved, whereof I. was one, not to extend this case to a formal interdiction, which is by the civil law only sustained *causa cognita*; and upon probation and decret given by the Judge, finding the person incapable; and, by our law, albeit interdictions without a process or decret be sustained, yet it is upon express bond, bearing, that the persons to be interdicted confess and acknowledge their insufficiency to manage their estate for want of prudence, and as being subject to be preyed upon, by any who should take advantage thereof, and so consented and gave warrant, that, publickly at the market cross, they may be interdicted and declared such in express terms; which not being done here, it was hard to extend it to a solemn interdiction; seeing it was of public concernment as to lawful creditors, who, *bona fide*, might lend their money as being in security, except as to all prior creditors who had served inhibition, which was not in this case. But at last it being urged, that this pursuer had taken advantage of the said Francis Hay, and that the money lent was not profitably employed, they did all agree, that there should be an act in the process, ordaining both parties to prove the true condition of the said Francis, as to his weakness and inability to manage his estate, as likewise as to the employment of the money. It was truly *in rem versam*, by payment of debts prior to the inhibition, as for his necessary use and subsistence, as to which they did declare that they would sustain his wadsets, notwithstanding of the inhibition, which seems consonant to law and reason. Thereafter, it being urged, that the publication of the inhibition could not be sustained, because the messenger who execute the same, was deprived of his office by an act of the Lord Lyon's court. THE LORDS did consider this as a general case, and found, that, that being but a private deed against the messenger, and never made public at the market cross, it did not hinder private subjects to employ him who did continue to exercise his office.

Gosford, MS. No 899. & 900. p. 578.

* * Dirleton also reports this case :

THE LORDS sustained the interdiction; (*voce* INTERDICTION) the defenders offering to prove, that the person interdicted was not *res suæ providus*; and FOUND,

No 5. That the person interdicted was thereby in the condition of minors; and that he and his heirs could not question any disposition or other deed done by him, upon the naked head of interdiction, unless they allege and qualify lesion; and that the pursuer of the reduction may prove that the bargain was profitably made, and that the price was *in rem versam*: And the Lords declared, they would not be nice as to probation, but reserved the consideration of it to themselves.

It was further *replied*, That the interdiction is null, being execute by a person that was not a messenger, being deprived; which was repelled, in respect of the answer, that it was offered to be proven, that notwithstanding of the sentence of deprivation, he was holden and *tentus et reputatus* to be a messenger; notwithstanding it was *triplied*, that the pursuer, in fortification of the sentence of deprivation, and his own deposition, offered to prove, that it was the common opinion of the country, that the executor was not a messenger, then being deprived; which was thought hard by some of the Lords; being of the opinion, that at least *habitus* and *tentus et opinio* ought to have been allowed to both parties to prove; reserving to the Lords to consider the probation, and to judge according to that which should be found most pregnant.

'Dirleton, No 382. p. 186.

1699. July 11.

No 6. MR MARK LERMONT, Advocate, against The HEIRS of LERMONT of Balcomy, and MR WILLIAM GORDON, Advocate.

A messenger's execution being quarrelled, because he was deprived, and the deprivation published at the market cross of Edinburgh, it being for no malversation, but deficiency in pointing the Lyon's dues, and he being still habite and repute a messenger; the Lords repelled the objection.

MR MARK LERMONT, advocate, against the Heirs of Lermont of Balcomy, and Mr William Gordon Advocate, was reported by me.—It was a process of roup and sale of these lands as being bankrupt.—*Alleged*, The execution of the summons was null, being by one Sibbald a messenger deprived, and his sentence published at the market-cross of Edinburgh.—*Answered*, His deprivation not being for malversation in his office, but only for not payment of some annual dues they owe the Lord Lyon, this cannot infer any incapacity to serve the lieges; *2do*, Whatever was the cause of his deprivation, it is enough to sustain his execution, that he continued notwithstanding to act, and was *tentus, habitus et reputatus* a messenger, according to the decision in the case of Barbarius Philippus, L. 3. D. de officio prator.—THE LORDS repelled this objection, and sustained the execution notwithstanding thereof.—*2do*, *Alleged*, It is still null, because it is offered to be proven, that the messenger, at the time of delivering the copy, wanted the summons, the warrant thereof; and being required by Mr William Hogg, the defender's advocate, to show his warrant, he refused the same.—*Answered*, *imo*, The messenger's oath anent his having the warrant amongst with him cannot prejudice the party, unless they offered to im-

No 6.

prove it ; 2^{do}, Mr Hogg's calling for it *non relevat*, the messenger being obliged to show it to none but the parties ; 3^{tio}, It is enough for the messenger that he saw the summons under the King's signet, and copied his execution of it ; for where there are 30 or 40 defenders dwelling *per omnes regni angulos*, it is impossible for one messenger to cite them all ; therefore four or five are employed, and the constant practice is, that though all of them have seen the warrant, yet one of them who has most to cite has the summons alongst with him ; and if this were sufficient to cast messenger's executions, it would endanger many diligences ; and though it may be necessary to have the warrant in hornings and captions, yet not in ordinary processes.—*Replied*, This inconvenience is easily remedied, by taking more copies of the summons from the signet ; and it is most unwarrantable in messengers to give copies of their executions, except they have their warrant in their custody to show, if it be called for.—THE LORDS found the messenger not obliged to show his warrant to third parties, not defenders, and that law presumed he had it on him, unless the contrary were proven.—Then it was *alleged*, The active title of this process was not sufficient, being only an infeftment of annualrent which is but a servitude, whereas none can pursue a sale but a creditor having a right of property ; 2^{do}, It ought to be an infeftment over the whole subject, which this is not, but only partial ; 3^{tio}, The progress is not connected.—*Answered*, All the act of Parliament in 1681 requires, is only, that sales be pursued by creditors having a real right, which agrees to an annualrenter as well as any other ; and it was so sustained to Mr William Monypenny pursuing for the roup of Nicolson.—THE LORDS repelled the defence in respect of the answer.—Then *alleged*, It could not sell, because he had Downie and Morton's apprisings both expired.—*Answered*, The first was reduced, and the second stated in the decret of ranking for its sums, which was inconsistent with its carrying the property ; though a creditor may use it both the ways.—THE LORDS thought the expiration not being declared, the appriser might protest to have his right reserved, but it could not stop the roup *hoc loco* ; being *processus executivus et judicium maxime summarium*. See RANKING and SALE. See TITLE to PURSUE.

Fol. Dic. v. 1. p. 201. Fountainhall, v. 2. p. 58.

1732. February 18. HUNTER against MONTGOMERY of Peanstonhall.

No 7.

A NULLITY objected to an execution of poinding was sustained, viz. that the poinding was performed, and the execution thereof subscribed by a person, who was, by the Lyon Office, deprived from being a messenger at arms, and his deprivation intimated or advertised in the public news prints, prior to the poinding. See This case *voce* DEATH. See APPENDIX.

Fol. Dic. v. 1. p. 201.

SECT. II.

Judge acting in feriate time ; or *extra territorium*.

1635. December 5. SUTOR against CRAMOND.

No 8.

A decree and precept of poinding were sustained, though pronounced in the Christmas vacation, because inferior judges used to sit frequently and administer justice in such times, wherefore the Lords thought it hard to annul their proceedings ; but here this was sustained for purging of a spuilzie, which is odious.

IN a spuilzie and ejection, the defender *alleging*, That the husband to this pursuer had renounced and over-given the land to the defender, whereupon he was entered to the land, and the pursuer, his relict, was ejected and put out of the room, and houses thereof, conform to the precept direct and execute by the sheriff-officer, which was proponed, and admitted to probation, to eleid the ejection ; likeas the said disposition bore, that her said husband disposed the particular goods contained in the disposition, (and for spuilzie whereof he was convened,) to the said defender, for satisfaction of the farms and duties, owing by him to the excipient, his master, according to a preceding tack, set to him by the defender, the which tack-duty was resting unpaid divers years, as the said disposition propoorts ; likeas the defender also poinded the said goods by the sheriff-officer, according to the execution made upon the sheriff's precept direct thereanent ; which exceptions being admitted, to purge the ejection and spuilzie, at the advising of the cause, the pursuer *alleging*, That the same could not be found proven, because the disposition made by the pursuer's husband, adduced to prove the same, was null, being a matter of 400 or 500 merks, and was only subscribed by one notary, which, in a matter of so great importance, against the act of Parliament, cannot be sustained ; and also *alleged*, That the sheriff's precept of poinding was not a warrant to poind and to purge the spuilzie, except both the sheriff's decret, whereupon it was direct, had been also produced ; neither were these sufficient, although the same had been produced, to give a warrant to poind, except the letters had been granted and directed by the Lords upon that sentence, to proceed to poind, without which the inferior judge could not execute his precept of poinding ; attour he *alleged*, That both the sentence given by the sheriff, if any there was, whereby the execution of the precept might be sustained ; and also the precept and execution were all null, because the same was executed in the time of the Yule vacance, which is a feriat and close time, wherein all judgments should cease. All these objections and allegiances were repelled, and the writ sustained, and the exceptions found proven sufficiently thereby ; for albeit the disposition had but the subscription of one notary only for the party, yet it was found good, being made for satisfying of the master's tack-duty, which was not alleged to be paid, and proponed to purge a spuilzie ; neither was there found any necessity to have any warrant of the Lords' letters, to precede the execution of the sheriff's precepts of poinding ;

and also the decret and precept of poinding were sustained, albeit they were done in the Yule vacance; for the precept was dated 26th December, and the same bore the decret to be dated 24th December; in respect inferior judges used to sit frequently, and minister justice in these times; and it were hard to infringe and annul all their proceedings done in these times; and this was considered, that it tended to purge a spuilzie, which is odious.

Act. Johnston.

Alt. Craig.

Clerk, Scot.

Fol. Dic. v. 1. p. 202. Durie, p. 784.

No 8.

1730. July. BLAIR *against* INCORPORATION of MARY'S CHAPEL.

In a competition of creditors, an objection was laid against a decree of furthcoming, that it was pronounced by the Magistrates of Edinburgh against inhabitants of the Canongate, over whom they had no jurisdiction.—THE LORDS were of opinion, That the Bailies of Edinburgh had no jurisdiction over the inhabitants of the Canongate; yet they sustained the decret upon use and wont, the Bailies having been in the constant custom of exercising such a jurisdiction; but they concerted an act of sederunt, discharging such jurisdiction in time coming. See APPENDIX.

Fol. Dic. v. 1. p. 202.

No 9.

1736. February 17. JOHN LEGGAT *against* ANN and RACHEL DENOONS.

In the question betwixt these parties, the LORDS found a decret of furthcoming, obtained before the Bailies of Edinburgh, sitting in Edinburgh, against one of the inhabitants of the Canongate, not subject to their jurisdiction, null; and repelled the *answer*, That, by constant and immemorial usage, the inhabitants of the Canongate were convened before the Bailies of Edinburgh.

Fol. Dic. v. 1. p. 202. G. Home, No 15. p. 36.

No 10.

*** Lord Kames reports the same case:

A DECRET recovered before the Magistrates of Edinburgh against an inhabitant of the Canongate, held as confest upon a citation *pro confesso*, was, after his decease, found intrinsically null, the defender not having been subject to the jurisdiction; and one cannot be considered as contumacious in not answering to a citation before an incompetent judge; *extra territorium jus dicenti impune non paretur*; and the LORDS did not regard the *communis error*, and constant consuetude of the Magistrates of Edinburgh, exercising a jurisdiction over the inhabitants of the Canongate, which might be sufficient to support di-

No 10.

ligence upon a debt habilely constituted, which is favourable, but can never be sufficient to found a debt, where there is no other document save the decret itself.

Fol. Dic. v. 1. p. 202.

S E C T. III.

Legal Diligence Executed at a Wrong Place.—Head Court Held
at a Wrong Place..

1610. February 14. CAIRNCROSS against HAMILTON..

No 11.

LANARK is the head burgh of the sheriffdom of Lanark, where denunciations are lawful against all persons dwelling within the shire; because, albeit there be two wards, yet there is no distinct jurisdiction, judge, nor clerk; but ane denunciation of ane man of the nether ward at Ruglen, will not be found null by way of exception, in respect of the custom to denounce oft times thereat.

Fol. Dic. v. 1. p. 202. Haddington, MS. v. 2. No 1801.

1622. December 7. INNES of Cotts against GRANT.

No 12.

A vassal of a regality was unlawed for his not compearance at his superior's head court, tho' holden at another place than was contained in his infeftment, because of 30 years custom to keep the courts at that place.

ALEXANDER INNES of Cotts, Bailie of the regality of Spynie, charged one Grant of Elchness for three unlaws, for his not compearance at the head court of the regality, according to his infeftment, every one of the three extending to L. 50. Grant suspended, That by his infeftment he was bound to compear at the head courts, to be holden at the place of Spynie, and so could not be unlawed for not compearance at head courts kept in the regality of Elgin. It was *answered*, That the head courts of the regality had been kept at Elgin, and acknowledged as the ordinary place these 30 years bygone by the whole vassals, and by this suspender. The matter was contentiously disputed by the LORDS, in respect of the tenor of the infeftment designing the place; nevertheless, in respect of the change of the estate of benefices, by erections and otherways, and that benefices are so dismembered by erections, that the courts cannot be kept at the places appointed by the old infeftments, and that Elgin was more commodious to the vassals, and acknowledged by them these 30 years, and particularly by this suspender; the LORDS found the letters orderly proceeded, but modified every unlaw to L. 10.

Fol. Dic. v. 1. p. 203. Haddington, MS. v. 2. No 2689.

1622. December 8.

INNES against INNES.

ONE INNES, vassal to the Bishop of Murray, being holden by the express clause of his infeftment, to compear in the Bishop's court to be holden at the place of Spynie, and being unlawed by Alexander Innes of Cotts, the Bishop's Bailie, for not compearance in his courts holden at another place than the place designed by his charter or infeftment; which being suspended on this reason, that he ought to compear in no other place than the place designed by his evident; —THE LORDS sustained the act unawing him for being absent from that other place where the courts were holden, notwithstanding of the place appointed by the infeftment; because it was alleged by the Bailie, that the suspender and his predecessors expressly, as also the rest of the Bishop's vassals, hath been in the use these 30 years bypast, to come to that other place at which only the Bishop's courts were kept, and not to the place designed in the infeftment; which allegiance of the suspender, and his predecessor's use of coming to that other place, being their own deed, the LORDS found relevant to elcid the reason founded upon the infeftment, and place therein mentioned, seeing the suspender could not qualify nor allege any prejudice which he could sustain by coming to that place where the courts were in use to be holden, and by that change from the place of his infeftment.

Act. *Aiton.*

Alt. —.

Clerk, *Gibson.**Durie, p. 37.*

No 13.

The place, where a baron's courts were held, was different from that mentioned in a vassal's infeftment. The vassal, notwithstanding, was unlawed for non-appearance at the court which custom had sanctioned.

1623. February 12.

INNES against GRANT.

INNES of Cotts, Bailie to the Bishop of Murray, of the regality of Spynie, charged Grant, one of the vassals, to pay the unlaw of L. 50 for many years, as the unlaw for his not compearance at the head court of the regality. Grant suspended, *alleging*, That Spynie was the place appointed by his infeftment, which was repelled in respect of the jewel-house of the thanrie of Elgin observed as the place of the head court for 30 years bygone, acknowledged by the vassals, and especially by the suspender and his father. Next he *alleged* that the unlaw was excessive.—The charger *answered*, That it was according to the act of Parliament.—THE LORDS modified the unlaw to L. 20 for absence from every head court. Lastly, he said that he could not compear personally, because he held land of the King and other superiors, at whose courts he behoved to compear; and so could not compear personally at the court of regality, but was content to send an attorney. Notwithstanding whereof, the LORDS found the letters orderly proceeded, reserving to the suspender his lawful defences, as accords of the law.

No 14.

Found as above.

Eq. Dic. v. 1. p. 203. Haddington, MS. v. 2. No 2759.

No 15.

In a shire, where there is a certain place appointed by act of Parliament for denunciations upon hornings, a party not having denounced there, but at another place where denunciations were frequently made since that act, the horning was sustained notwithstanding of the act, in respect of the posterior custom.

1626. June 16. PRIOR OF ST BATHANS *against* CARMICHAEL.

A DECLARATOR of escheat being sought at the instance of the Prior of St Bathans against Carmichael; the horning was quarrelled by the defender, because the party was not denounced rebel at the cross of Greenlaw, which was appointed to be the place whereat all hornings should be executed against persons, indwellers within the sheriffdom of Berwick, conform to the act of Parliament 1600, whereby the same is statute; and which act declares all hornings otherwise executed at any other place or market cross to be null; and this horning controverted, was executed at Dunse, and not at Greenlaw, conform to that act, and therefore was alleged to be null. This allegiance was repelled; and the horning, executed at Dunse, and not at Greenlaw, was sustained, notwithstanding of the said act of Parliament, in respect of the frequent use observed since the said act, in executing of hornings and denouncing rebels, since that act of Parliament, at the cross of Dunse; which contrary consuetude against the said act, the Lords found relevant, and admitted the same to the pursuer's probation, to sustain the said horning, and found the same should be proven by hornings executed since the act; likewise there was a practice produced before the Lords, betwixt Mellerstanes and Hume of Eccles, in anno 1606, where the like was so decided before.

Act. *Belshes.*

Alt. *Boid.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 202. Durie, p. 202.

No 16.

An inhibition not found null for being executed within the shire of Berwick at Dunse, and not at Greenlaw, notwithstanding of the act of parliament, appointing Greenlaw to be the head burgh of the shire, and that because of the consuetude, and that the said act was only a private act never printed nor known in this country.

1632. March 7.

DICKSON *against* SCOT.

IN a reduction upon a reason of inhibition, the defender *alleging* the inhibition to be null, because being execute within the sheriffdom of Berwick, it was not execute at the market-cross of Greenlaw, but only at Dunse; albeit, by act of Parliament, it is appointed, that all such executions and hornings should be execute at Greenlaw, which is declared the head burgh of the sheriffdom by that act, and all executions otherwise made, are declared null. This allegiance was repelled, and the inhibition sustained, in respect of the consuetude, and use to execute at Dunse, notwithstanding of that act, and that the act is not in observance, and that it is but a particular private act, not printed, and so not public and known to the lieges, but contained in a ratification of an infestment of some lands, granted to the Earl of Dumbar, wherein Greenlaw is erected the head burgh, with the declaration foresaid, and which is ratified in Parliament, and so is but a private act, not kept, nor known in the country, nor printed, or published; and this was done without any probation.

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 202. Durie, p. 627.

1585. *March.* MARGARET CRAWFURD *against* OLIPHANT of Condie.

AN inhibition being quarrelled, as not duly execute at the head burgh of the regality of St Andrews ;

Answered ; It was execute at the head burgh of the stewartry of Strathern, within which the inhibited person's lands lie. 2, *Esto* the lands lay within the regality of St Andrews, it is offered to be proven, that legal diligence against those lands was usually executed at Strathern, which is sufficient to maintain the execution quarrelled, as diligence used by persons habit and repute messengers will be sustained after their deposition.

Replied ; *Non relevat* that diligences were indifferently execute at Strathern or St Andrews, unless the defender will offer to prove, that, for the space of forty years, all diligences concerning the several lands were execute at Strathern, for if any one execution had been made at St Andrews within the forty years, it preserves the privilege of the regality, conform to the act of Parliament.

THE LORDS found it relevant to support the inhibition, that for the space of forty years all diligences concerning these lands were executed at Strathern, and not that executions were made promiscuously at Strathern or St Andrews.

Fol. Dic. v. 1. p. 202. Harcarse, (INHIBITION.) No 637. p. 175.

No 17.
An inhibition not having been executed at the head burgh of the regality ; usage for forty years was found necessary to support the execution at the head burgh of the stewartry.

1733. *February 20.*

HAY of Strowie, *against* CREDITORS of David Simpson.

IN a competition, it was objected against an inhibition led against an inhabitant of the town of Kirkaldy, that it was executed against the lieges at Coupar, the head burgh of the shire, whereas it ought to have been executed at Dunfermline, the head burgh of the regality where Kirkaldy lies. It was *answered*, That *communis error facit jus*, and it was commonly understood, that the town of Kirkaldy was not within the regality of Dunfermline ; for a proof of which, a condescendence was given in from the 1644, downwards, by which it appeared, that most of the diligences against the inhabitants of Kirkaldy were executed at the head burgh of the shire, many of them at both the head burghs of the shire and regality, and half-a-dozen of them at the head burgh of the regality only. On the other hand, it appeared, that a great number of the processes had been carried on against the inhabitants of Kirkaldy at the regality courts ; and it was *pleaded* against the inhibitor, whatever might be the case, were the question only with the debtor, yet in a competition of creditors, every objection ought to have its full weight. THE LORDS sustained the objection against the inhibition, that it was not executed at the head burgh of the regality. See APPENDIX.

No 18.
The objection that an inhibition was not executed at the head burgh of regality, was sustained, in a competition of creditors, notwithstanding of *communis error*, of executing diligences at another place.

Fol. Dic. v. 1. p. 203.

1740. December 9. EARL of HYNDFORD *against* The BURGH of HAMILTON.

No 19.

Found, that the Sheriff could not transfer his court to the head burgh of the shire, from a burgh of regality where it had been held for centuries.

THOUGH the head-burgh of the shire be the place where the Sheriff-courts of right ought to be held, yet where, for almost two centuries, the Sheriff-court had been held in a burgh of regality, it was found that the Sheriff could not transfer the Sheriff-court from thence to the head-burgh of the shire, notwithstanding it appeared from the records, that in the most ancient times, the Sheriff-courts had been for some years held at the head-burgh of the shire; for that nothing certain could be inferred from the court's being held at the head-burgh for some years, in ancient times, when the place of courts was more ambulatory, to defeat the right which arose to the burgh of regality from such ancient possession, the original whereof could not now be known. And as to the argument for the Sheriff's power of transferring the courts to the head-burgh, notwithstanding the lapse of time, that he could not compel the burgh of regality to allow him the use of their court-house, or their prison, the long use was thought sufficient to establish to him a right to court and prison-houses.

N. B. On this occasion, it was thrown out by an able judge as his opinion, That where a regality, or even a barony, is erected into a body corporate with a burgh, and that there is a prison in such burgh, they are obliged to receive the King's prisoners, whether apprehended within or without the regality; though, where there is no burgh or body corporate, as is the case of the Duke of Athole's extensive regality of Logierith, even though there be a prison and a court-house, the bailie of the regality is not bound to receive any prisoners but his own; but that wherever there is a burgh erected into a body corporate, then the prison of the regality or barony is the King's prison. See PUBLIC POLICE.

Fol. Dic. v. 3. p. 164. Kilkerran, (CONSUETUDE.) No 1. p. 149.

SECT. IV.

Deeds executed in a Wrong Form.—Sasine not Registered.—Wrong Symbols of Sasines.

No 20.

being the bottom of a burgh, that all reversions should be under the form of instrument

1554. June 15. GALLOWAY *against* BURGH of DUMBARTON.

ANENT the action persewed be Mr Galloway against the Burgesses of Dumbarton anent the redemption of ane burrowland, in the said Burgh be virtue of ane reversion made in form of instrument, but it should have been under the seal

and subscription manual of party;—it was *replied* be the said Galloway, That it was use and custom of the said Burgh, past memory of man, that all reversions made in form of instrument made be the common clerk of the town, were as sufficient as any other reversion; whilk reply was admitted be the LORDS, to the said Galloway, Provost.

Fol. Dic. v. 1. p. 204. Maitland, MS. p. 119.

No 20.
taken in the town clerk's hands, the Lords sustained the same, altho' regularly, reversions cannot be valid, unless subscribed by the party.

1623. July 10. EDMISTON of Wolmet against ———.

IN this action of Edmiston of Wolmet *contra* ———, whereof the title of this pursuit was a sasine of a tenement of land within Leith, which being quarrelled by the defender upon nullity, because it was not registrate in the books of the clerk-register, conform to the act of Parliament in anno 1617;—the LORDS repelled the allegiance, and sustained the sasine, because it was of a tenement within Leith; which albeit it was not within a burgh-royal, and holden burgage, that thereby it might have the privilege of the exception contained in the act of Parliament, which is conceived in favours of burghs-royal; yet in respect of the consuetude and perpetual custom of giving of such sasines by the bailies of Edinburgh, and that never any was in use to be insert in the fore-said register, and of the dangerous consequence whereby many of the subject's right would fall if this nullity should have place; therefore the LORDS sustained the sasine, but nevertheless they declared, that if the excipient would allege that it was, and is, the custom in Leith to registrate sasines in that register, that they would sustain the allegiance.

Clerk, Hay.

Fol. Dic. v. 1. p. 203. Durie, p. 72.

No 21.
An erroneous practice by which the magistrates of Edinburgh gave sasine of subjects in Leith, did not annul the sasine; on account of the constant custom, and the danger to many other sasines if the nullity should take place.

1708. February 7. YOUNG against CALDERWOOD.

IN a competition for the rents of a house in Edinburgh, betwixt Sir Thomas Young and Calderwood of Pitteddie, it was objected, that Sir Thomas's sasine was null, because in the resignation made in the magistrates' hands, as the Queen's commissioners, the symbol of surrender is made to be tradition of earth and stone, which is the symbol proper only in sasines, whereas their fixt and known symbol by our stile, past all memory, is by staff and baton; and it is of very dangerous consequence, to change our ancient stiles, especially having no such warrant by the procuratory. *Answered*, It is confessed to be an error and mistake, but which has so generally prevailed, that many others have run into the same error; and to annul them all at one stroke may be very prejudicial to the lieges; for whatever the Lords may do in time coming, yet for

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No 22.
A sasine by magistrates, with earth and stone, instead of staff and baton, was sustained on account of the custom; but the Lords declared they would hold any such future error to infer nullity.

No 22. bygones, *error communis* may so far excuse such an error. THE LORDS having tried at the town clerk, and having found there were many in the same condition, they sustained the sasine and resignation, and repelled the nullity; but resolved to make an act of sederunt discharging that practice in time coming, under the pain of nullity, in all competitions with other creditors, more formally infest.

Fol. Dic. v. 1. p. 203. Fountainhall, v. 2. p. 428.

SECT. V.

Process carried on in a wrong form.

No 23.

A decree of lining given by the provost and bailies of Dumfermline was reduced, because the brieve was not proclaimed upon 15 days, nor a precept directed upon a claim given in by the purchaser of the brieve against the special parties having interest, nor any formal order of process kept, tho' it was alleged to be conform to the ordinary custom and manner of proceeding in that burgh.

1629. February 14.

WRIGHT against STIRK.

IN a reduction of a brieve of lining or limiting, and decret conform thereto, given by the Provost and Bailies of Dumfermline, to whom the brieve out of the chapel of Dumfermline was directed to that effect; this reason of reduction was found relevant, and the brieve was reduced, because the brieve was not proclaimed upon 15 days, not a precept direct upon a claim, given in by the purchaser of the brieve against the special parties, having interest in the lining of the tenement therein contained, for summoning them thereto, nor no formal order of process kept; which reason was found relevant, albeit the defender contended, it was not relevant in this case of brieves of lining, which hath a summary proceeding; and that by the consuetude in the burgh of Dumfermline, no other claim is given in but summary trial taken betwixt the parties; likeas the parties are summoned by the brieve and warrant thereof; which exception was repelled.

Act. Mowat.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 1. p. 204. Durie, p. 425.

No 24.

Decree subscribed by the commissary in place of the clerk sustained, because of the custom, but

1631. February 10.

A. against B.

THE Commissary of Brichen having pronounced a decret betwixt two parties, which being extracted, was subscribed by the Commissary, who was judge thereto, and not by his clerk, and therefore was quarrelled as null, seeing these being two distinct offices, as the clerk could not be judge, no more could the judge be clerk; for, as the judge could not sit down and minute processes, and

write his own ordinances, no more could he subscribe decreets; notwithstanding whereof the decret was sustained, seeing it was the custom of that court, and divers other inferior judicatures to do the same; but the LORDS found it a custom unlawful, and not to be hereafter allowed, and ordained the Commissary to abstain therefrom in time coming.

Fol. Dic. v. 1. p. 204. Durie, p. 567.

No 24.
the custom found not right, and therefore not to be sustained in time coming.

1708. July 15.

GEORGE HOUSTOUN, and his TUTORS and his CURATORS, *against* LORD ROSS.

GEORGE HOUSTOUN having raised suspension and reduction of a decret in absence, obtained by the Lord Ross before the Admiral, against the deceast Patrick Hustoun the pursuer's father, upon this ground; That the same was null for being extracted without the warrant of a decerniture signed by the Judge, contrary to the act 3d, Parliament 1686, and might have been of the clerk's manufacture;

Alleged for my Lord Ross: The custom of the Admiral court requires no decreets in absence to be signed by the Judge, but only decernitures upon debate; and the customs of particular places derogate even from a general custom, witness December 14. 1671, Duff and Brown *contra* Forbes of Cullodden, *voce* PROOF; and the case of Ross of Tullisnaught *contra* Turner.

Answered for the pursuer: The argument from the custom of the Admiralty is most irrelevant, unless they pretend a power of dispensing with acts of Parliament. For though it be not necessary for a Judge to sign ordinary steps of process, such as continuation of diets, orders about seeing and returning, or production of writs, whereupon nothing is to be extracted; the Judge's interlocutors for an act or decret, is an indispensable check upon the clerk, any contrary custom notwithstanding. Because indeed, *consuetudinis ususque longævi non vilis est auctoritas, sed non usque sui vultura momento, ut rationem vincat aut legem*. So custom did not sustain an unwarrantable adjection to a tax-roll, December 15. 1666*. Laws concerning the public good and regulation cannot run in desuetude, Jack *contra* Town of Stirling, No 3. p. 1838. Yea, the town of Edinburgh's decret as patrons, against Mr Andrew Massie a professor of philosophy in their college, was reduced, for that some of the interlocutors were not signed; and the commissary of St Andrews's subscribing only the docquet after all the depositions of witnesses, was found to annul the decret extracted thereon. The decision, December 14. 1671, concerns only the special set of a particular burgh, which differs in different burghs. Nor is that betwixt Ross of Tullisnaught and Turner any more to the purpose; for there the interlocutor not having been signed when pronounced, in expectation of agreement

No 25.
An admiral's decree in absence for not finding caution *judicio sisti et judicatum solvi*, found null, and turned into a libel, on this ground, that the decerniture or warrant thereof, was not signed by the judge, notwithstanding that, by custom of the court, the judge had not for a long time signed any such decernitures.

* L. Colvil against Fears of Kinross, Stair, v. 1. p. 413, *voce* PUBLIC BURDEN.

No 23.

of the parties, the LORDS, by voting it over again, ordained it to be signed *in presentia*.

THE LORDS sustained this nullity of the decret, that the decerniture or warrant thereof was not signed by the Judge ; and therefore reduced the same.

Fol. Dic. v. 1. p. 204. Forbes, p. 265.

S E C T. VI.

Informal execution.—Term of entry.—Sentence-money.

1624. June 17.

CRAWFORD *against* WOOD.

No 26.

A decree was found intrinsically null, without reduction, because the execution of citation wanted witnesses, although such executions were customary.

In a suspension betwixt Crawford and Wood, the LORDS found a decret given by the Provost and Bailies of Edinburgh, which was suspended then, to be null summarily, without reduction ; because the same was given against the suspender, as holden as confest, being summoned to give his oath by one of the town officers, and his execution having no witnesses, in respect whereof, that citation was found could not be sustained, and the decret therefore was null ; albeit it was *alleged* against the suspender, that the form within the burgh of Edinburgh, was, that executions made by their officers, were made without witnesses, and that the officers were sworn in judgment, upon the verity of their executions ; which form the LORDS would not allow, because thereby the ordinary mean of improbation, viz. by the witnesses, was taken away.

Clerk, *Scot.*

Fol. Dic. v. 1. p. 204. Durie, p. 129.

No 27.

Found as above, where the custom was to cite parties without any written execution.

1626. July 25.

DICKSON *against* ANDERSON.

In a reduction betwixt Dickson and Anderson of a decret obtained before the Bailies of Dumfries, decerning Dickson to pay 500 merks, being referred to his oath, and not compearing, &c.,—this decret being desired to be reduced, because he was never warned by any officer to compear ; and the executions being called to be produced, and to be improven in this process, the defender compearing, and *alleging*, that in their burgh-courts their custom was to command their town-officers to pass and warn parties to compear before them, and

to give their oaths upon the claims referred to their oath; and that there used no writ to be made upon their officers warnings, and no execution in writ was usually produced by the officers, but only they compeared in judgment, and made relation to the Bailie, that they had warned the party, either personally, or at his dwelling-place, and upon his report decret was given; so that for not production of their officers' execution the sentence could not be reduced. This allegiance was repelled, and this custom was found not to be allowable, for thereby the ordinary means, to try the verity of the officers' warning of parties, and the way to improve the same, was taken away, which ought not to be permitted, and to give therein more trust to the relation of a messenger or officer, than is due to him, and which ought not to be: So the LORDS found, that in such citations and warnings made by town-officers, the least that could be done in any lawful process, proceeding judicially thereupon, by the magistrate of burgh was, that when the officer made his report in judgment, that thereupon a note should be made by the town-clerk in writ, bearing, 'That such an officer made such a report in judgment, viz. That he upon such a special day warned the party, either personally or otherways according as he happened to do, to compear in such a cause, and before such special witnesses named and designed;' which report in writ the LORDS found ought to be extant, and made furthcoming to all parties, when the process should be called in question, or the saids executions called to be produced by the parties having interest; and which being so extant and exhibit, the LORDS found might supply the production of any precept, or executions of officers called for to be produced.

Act. Beliber.

Alt. ———

Clerk, Gibson.

Fol. Dic. v. 1. p. 204. Durie, p. 227.

No 27.

1633. July 20.

BROWN against MAXWELLS.

MR ROBERT BROWN charges Mr William and Patrick Maxwells, for payment of the mail of a chamber set to them, conform to a contract made betwixt them; who suspending that they cannot pay the duty, as that contract obliges them; because by that contract the charger is obliged to enter them precisely at Whitsunday to that chamber; and it is true, that ten days after Whitsunday, by instruments they required him to enter them thereto, which was not done, but the possession still retained by him, who possest it about 20 days thereafter; so that it being a month after the term ere the house was made void, they were forced to take another chamber; being in the time when the King was in Scotland, where they had a necessity of a chamber to ease their friends who came home with him; and therefore they ought to be free of this tack. And the pursuer opposing the contract, and that it is not the custom of the town, to remove so precisely at the term; and it is no reason that for so usual delay in removing, this tack should be made void, and he so heavily pre-

No 28.

Where access to a house or chamber, set in tack, is required ten days after the agreed term of entry, but not given for 20 days, so that the tacksman comes to be obliged to take another lodging, he is free from the tack, and cannot be obliged to pay the rent, tho' it be proved, that by the custom of the place, entry to the possession of

No 28.
such lodgings
is not com-
monly given
sooner than 20
days after the
term.

judge ;—the LORDS nevertheless sustained the reason, and suspended the charges upon the contract against them *simpliciter*.

Act. *Hart.*

Alt. ———.

Clerk, *Hay.*

Fol. Dic. v. 1. p. 204. Durie, p. 687.

No 29.
Altho', by the
general cus-
tom of Scot-
land, sen-
tence-money
belonged to
the judge, yet
the LORDS
found, that
the parti-
cular custom
of a particu-
lar place
derogated
from the ge-
neral; and
that being
proven, they
preferred the
clerk.

1684. December 17. CATHCART against IRVINE.

JAMES CATHCART of Carbiston, clerk of the Canongate, pursues Irvine his depute for the sentence-silver. *Alleged*, That by our law, and the custom of all courts, the sentence-money belongs to the judge, and not to the clerk. *Answered*, By a special custom in Edinburgh and the Canongate, it was a perquisite and a pendicle of the clerk's office; and it is but within these twelve months that the Magistrates of Edinburgh have, by their act, taken it away from the clerks, and annexed it to the bailie's office. 'THE LORDS found the particular custom derogated from the general; and that being proven, they preferred the clerk.'

Fol. Dic. v. 1. p. 204. Fountainhall, v. 1. p. 322.

1782. March 10.

MARGESTON against The PROCURATOR FISCAL and CLERK of the High Court of Admiralty.

No 30.
A practice of
giving the of-
ficers of the
admiral court
more than the
ordinary dues
of court, in
cases of prize,
discounte-
nanced.

MARGESTON having captured an American vessel, obtained sentence condemning the same as lawful prize, in the High Court of Admiralty; and demanded an extract of this sentence, upon payment of the usual dues.

The Judge-Admiral found, 'That as the prize was of considerable value, the captors were liable to the deputy clerk of court, for behoof of all concerned, in the sum of L. 40 Sterling; and that over and above the the sums paid as the dues of extract.'

In an advocacy of this judgment, the LORDS

Found, 'That the officers in the Court of Admiralty, in questions of prize, were entitled to no more than the ordinary dues of court.'

Reporter, *Lord Kennet.*

Act. *Henry Erskine.*

Alt. *Monro.*

Fol. Dic. v. 3. p. 165. Fac. Col. No 43. p. 70.

See APPENDIX.

C O U R T E S Y.

1610. June 7.

C. SPENS against LD of DURIE.

No 1.

HE that married a woman who had heritage or annualrent heritable, and procreate a living bairn upon her, will get the curiality as well of her annualrent as her lands, albeit he be her second or third husband.

Fol. Dic. v. 1. p. 205. Haddington, MS. No 1881.

1631. July 15.

FORBES against E. MARSHALL.

No 2.

THERE was an action, Forbes *contra* E. Marshall, disputed before the Lords. The case thereof was this; Forbes had married the only daughter, and only bairn of the Laird of Troup, whose lands were tailzied to the Earl of Marshall, failzieing of heirs-male of his own body. After the father's decease, the Earl Marshall contracts with the said daughter, and obliges him to provide her to 10,000 merks, by heritable security, in contentation of all right she might claim; after which contract, she being married on this Forbes, and there being a bairn gotten betwixt them living, thereafter both the mother and bairn dies; after whose decease, Forbes the husband claiming the liferent of this 10,000 merks by the right of curiality; and the Earl Marshall defending, that the curiality could not have place in this case, where the wife was not successor to her predecessor, viz. her father, and where she was not infeft in lands wherein he died infeft; but this was a conquest, or such a purchase, wherein curiality had no place, being an acquisition made by the woman's self. And the husband *replying*, That this provision came to her in place of the lands, wherein her father was infeft; so that it was of the same nature as if she had succeeded to her father. This was not decided, because twelve hours hindered the decision thereof. But many of the LORDS thought that curiality had no place in this case.

The only daughter of the proprietor of an entailed estate, which went to heirs-male, obtained from the heirs-male and provision heritably secured. Agitated but not decided, whether the courtesy took place.

Act. Stuart & Baird.

Alt. Advocatus & Nicolson.

Clerk, Hay.

Durie, p. 597.

1632. July 20.

STEWART OF ANDERSON *against* IRVINE.

No 3.

Although the children die before the mother, and both within the year, yet the husband has right to the courtesy.

ALEXANDER IRVINE is obliged, by contract of marriage, to pay in tocher with —, his half-sister, a certain sum to her future spouse; the heir of the husband pursues registration of the contract against Irvine. *Excepted* the marriage dissolved within year and day be the wife her decease. *Replied*, There was a bairn born and christened. *Duplied*, The bairn died before the mother, and both within the year, and bearing of a bairn gives only by practice the benefit of curialitie, but not of tocher nor conjunct-fee, this never being practised. Finds I. P. the contract to be registrate, and repells the exception and duply, and finds the reply relevant.

Fol. Dic. v. 1. p. 205. Nicolson, MS. No 37. p. 38.

1636. January 19.

M'AULAY *against* WATSON.

No 4.

A husband having claimed his right of courtesy during his life, his executors could not claim it in prejudice of a singular successor from the heir of the heiress. See No 20. p. 1740.

AGNES WATSON executrix confirmed executrix to Robert Watson her brother, obtained a decret before the commissaries of Edinburgh, against James M'Aulay heritor of certain lands within Edinburgh, for payment to her of the mails of the saids lands from the 1604 to 1628; which mails as she alleged, did of right belong to the said Robert all these years, by reason of the courtesy of Scotland, in regard he had married the heritrix of the said lands, and consequently did now appertain to her as executrix to her brother. The said James M'Aulay intended a reduction of this decret upon this reason, that this courtesy is only personal, and died with the person of the said relict, who having neglected it all his lifetime, his executors can claim no right thereunto after his decease; even as in a Lady tercer, who albeit she had never so good right to a terce, yet if she be not kenn'd to it in her own time, in vain should her executors sue for it. And this pursuer being infeft in the saids tenements by disposition from the heritor thereof, and having brooked them *bona fide* all the years libelled unquarrelled, cannot now be drawn in question *post tanti temporis intervallum et post fructus bona fide perceptos*; no more than if the said Robert were yet alive himself, who would not be heard to seek the bygones of so many years, which the heritor had intromitted with *bona fide*. *Alleged*, The reason was no ways relevant, for the mails being due to the defunct, his executors had good right to seek them, neither was the *simile* of lady tercer to the purpose, because by the ordinary practice, before a woman can have right to a terce, she must be first served by a brieve, and after that kenn'd to it by the Sheriff's precept; before which be done, if she happen to decease, it is true that her executors have no place to call for the profits of the said terce; but it is otherwise in a curiality, whereunto he that has right needeth no previous declarator of the same, but may summarily, by virtue of his right, enter to the possession of the lands,

whereunto he hath right during the courtesy : And the pursuer's possession cannot maintain him against the defender's uncontrollable right, nor can he be thought to have possessed *bona fide* where another had a good right standing. THE LORDS found the reason of reduction relevant.

Spottiswood, (CURIALITAS.) p. 78.

No 4.

1702. February 20.

ROBERT DARLEITH and his Tutor, *against* Mr ALEXANDER CAMPBELL.

MAGDALEN EDMONSTON, only child to James Edmonston, merchant, being first married to one Darleith, and by him had the said Robert, her son ; she afterwards marries the said Mr Alexander Campbell, by whom she had likewise a son, but he died a little after his birth ; and when she is on death-bed, Mr Alexander, her husband, serves her heir to her father in some houses in Edinburgh, and infefts her by hesp and staple, *more burgali*, and then procures a disposition from her in his own favour ; but Robert, her son of the first marriage, serving heir to his mother, raises reduction of that disposition *ex capite lecti*. *Alleged, 1mo*, He had acquired a right to some debts, which would make the disposition as onerous *pro tanto*. *2do*, He had right to liferent the whole by the courtesy of Scotland, his wife being an heiress infeft, and there having been a living child heard weep and bray. *Answered*, No husband of a second marriage can claim the curiality, where there exists an heir of the former marriage. *2do*, She died not in the fee, being denuded in his favour. *3tio*, The serving her heir and infefting her being all done when she was on death-bed, cannot prejudice her heir. *4to*, It takes no more place in burgage-lands, no more than a terce does. *Replied*, Our law and eustom have made no distinction whether the heiress be a maid or a widow, or whether the husband be the first, second, or third, and whether there be heirs of a former marriage or not ; for, if he exclude the last husband from a courtesy, why does not a brother, or other remoter heir succeeding, as well exclude him, which we know is not pretended. *2do*, This pursuer quarrels the disposition *ex capite lecti* ; and if he prevail, then her fee revives, and consequently the curiality takes place. *3tio*, The serving her heir, and infeftment *in lecto*, were not alienations, (which are only prohibited at that time), but rather an acquisition, and so not quarrellable. To the *4th*, Stair, tit. LIFERENT INFESTMENTS, and our other lawyers, are clear, that courtesy holds in burgage, as well as in country lands. *Duplied*, The courtesy being local, and peculiar to Scotland and England, is not to be extended, and has been given to the father as administrator to the apparent heir, but not to a step-father, and is only due to a husband where his child would have been heir to the estate, which did not exist in Mr Campbell's case ; and though the infefting her on death-bed was no alienation, yet it was in order to capacitate her to make a very unnatural and unkind one by her own son, to her second husband,

No 5.
The second husband of an heiress cannot claim the courtesy where there is a son of a former marriage alive.

- No 5. Several of the LORDS thought there was no difference whether the heir was the husband's son, or of a prior marriage, and that the curiality was due in either case, and was not given *intuitu* of the heir, but to make the husband live honourably, and suitable to the heiress's estate and circumstances after her decease: But the case being new, the LORDS resolved to hear it in their own presence in June next, before they would determine it.

December 1.—THE case mentioned 20th February 1702, between Robert Darleith and Mr Alexander Campbell, being heard in presence, was this day advised and determined; being an abstract point in law, Whether a second husband has right to the courtesy, where the heiress, his wife, has a son by a prior marriage? Craig, lib. 2. dieg. 22., is for the affirmative, though it was answered to his authority, that, as to these words, *Etiam si primus maritus habuerit hæredem, tamen secundo debetur*; that *habuerit* must be so taken as to import the child that is now dead, otherwise, if it were alive, he would have said in the present time, *etsi habeat*, and not *habuerit*; and *Regiam majestatem*, lib. 2. cap. 58. seems to clear this, that a husband shall liferent his wife's heritage, *si ex eadem hæredem habuerit*; so that it is due to her husband, not under the reduplication *qua* husband, else every husband would have right to it, though he procreate no child by her at all; but was under the reduplication as parent to the heir. Yet, *vide Leg. burgorum*, cap. 44. which requires not the procreation of the heir, but only *si ex ea genuerit masculum vel fœminam*. Skene *de verb. significatione*, voce *Curialitas*, thinks its original was *ob reverentiam prioris matrimonii, quod quis cum uxore hærede contraxerit, ne, ea mortua, ad egestatem maritus redigatur*; though Craig derives it from the Emperor Constantine's rescript, l. 1. C. *de bonis maternis*, giving the parent the usufruct of his children's heritage, derived to them by succeeding to their mother: And seeing this custom differs from the common law, the LORDS have been in use to interpret it strictly; as Forbes *contra* the Earl of Marishal, No 2. p. 3111.; the courtesy was not extended to the liferent of a sum, which was the price of lands belonging to the wife in fee, though *surrogatum sapit naturam surrogati*. And 19th January 1636, Macaulay *contra* Watson, No 20. p. 1740. and No 4. b. t., the husband's executors were secluded from the courtesy, because neglected to be pursued for by the space of thirty years, though that was ten years within prescription. THE LORDS, by a plurality, found the second husband could not claim the courtesy where there was an heir of a former marriage in life.

Fol. Dic. v. 1. p. 205. Fountainball, v. 2. p. 149. & 162.

No 6.

The courtesy found to take place only where

1709. June 22.

LAWSON against GILMOR.

JANET WHITE being married to one Lawson, in her widowity, buys a tenement in Anstruther, and some acres, and then marries Charles Gilmor. She

being deceased, and he refusing to cede the possession of the lands, Thomas Lawson, her son of the first marriage, and her heir, upon a warning pursues Gilmor, his step-father, to remove. *Alleged*, He must have the liferent in right of the courtesy, his wife having died last vest, and seased in these lands. *Answered*, No courtesy in this case; because that only takes place, where the wife succeeds in lands and heritage, as heiress to some of her predecessors; but here she has it by purchase and acquisition, as a singular successor, where the courtesy was never claimed; and there is scarce any principle wherein our lawyers are more clear and positive than in this. *Vide Skene de verbor. Sign. voce Curialitas*, and his notes on *Regiam majestatem*, lib. 2. cap. 58.; Craig, lib. 2. Feud. Dieg. 22. Stair, lib. 2. tit. 6. who citing the foresaid Skene and Craig, joins with their opinion; and Sir George Mackenzie, tit. MARRIAGE, who states the courtesy to arise by marrying an heretrix; so the vouchers being so unquestionable, it is wondered how it comes to be debated. *Answered* for Gilmor, the husband, that the origin of this courtesy, may either be derived from Constantine's rescript, *L. 1. C. de bonis matern.* giving the husband the liferent of all the wife's heritages; or from the Norman feudal constitutions, where the wife being vassal, and unfit to perform the military services, and other duties to the superior's court, the husband was substitute in her place, and in compensation of that burden liferented her fees, without distinction whether she succeeded therein, or otherways purchased and acquired them; and the famous English Lawyer Littleton, in his institutes and tenures, speaking of the courtesy, he does not restrict to the case of succession only; and though some of our own lawyers incline that way, yet the word *hæres* made use of by them in a large sense not only signifies an heiress, but comprehends any fiar or proprietor of lands; so Gilmor may claim the courtesy, though it came to his wife *titulo emptionis et venditionis*, even as a terce is due to a wife out of her husband's lands, whether he got them by succession or acquisition. THE LORDS remembered, that in the case of Campbell and Edmiston, (*supra*) they had preferred the wife's son of a former marriage to his step-father claiming the courtesy, which some thought a great stretch; but however, in this case the LORDS were all clear, that the authorities were so pregnant and uniform, besides the decision founded on, they could not recede from so fixed a rule; and therefore found the courtesy only took place where the wife succeeded in lands to some of her predecessors, but not where she acquired them herself, *ex titulo singulari*; and so repelled Gilmor's claim to the courtesy, and decerned him to remove.

Fol. Dic. v. 1. p. 205. Fountainhall, v. 2. p. 505.

* * * Forbes reports the same case:

In the action of declarator and removing, at the instance of Thomas Lawson, as heir to Janet White his mother, against Charles Gilmor her second husband, for removing him from a house purchased by Janet in her widowhood;

18 A 2

No 6.

the wife succeeded in lands to some of her predecessors, but not where she acquired them herself *ex titulo singulari*, and this because of the uniformity of all our authors and decisions on this head.

No 6.

Alleged for the defender ; His wife having died infest in the said house, he had a right of courtesy, and so could not be dispossessed.

Replied for the pursuer ; The courtesy could not take place in this case ; in respect the house belonged not to the wife as an heiress, but was purchased by her, and courtesy is only due to the surviving husband of an heiress, *Reg. Majest. Lib. 2. cap. 58. Skene de Verb. Curialitas. Craig, Lib. 2. Dieg. 22. Vers. Fin. Mackenzie Instit. Lib. 1. tit. 6.*, the reason is, because an heiress is supposed to have a rank and dignity to be kept by her husband after her decease, which a woman purchasing is not supposed to have.

Duplied for the defender ; Probably the courtesy was brought into Scotland from the practice of England, as several other feudal customs and observations were ; and Littleton, the great English lawyer, *Instit. lib. 1. ch. 4. sect. 35.* holds a courtesy to be due, if the wife was seised in fee, and there was issue alive of the marriage, without distinguishing if she had the right by succession or by singular titles. Again, *Leg. Burg. cap. 44.*, no such distinction is made : Nor doth Craig, *lib. 2. dieg. 22.*, mention the word *hæres*, in contradistinction to a proprietor by singular titles, but only as what falls out most frequently, that womens heritage comes by succession. And it is equally reasonable, that a husband should liferent the wife's lands that she acquired *singulari titulo*, as those she succeeded to as heiress ; especially considering, that law gives her a terce of all lands wherein he died infest, without distinction, whether the same came by purchase or succession. It is of no import, that the courtesy is more extensive than the terce, seeing the nature of the subject, and not the quantity, is debated.

Duplied for the pursuer ; There is no arguing in this case from a terce to the courtesy, which not only differs from it in quantity, but also was introduced upon a different account ; the former being in place of a marriage provision to the wife, and the latter a mere favour indulged by law to the husband of an heiress.

THE LORDS found that the courtesy doth not extend to lands acquired by the wife by singular titles, but only to those she succeeded to as an heiress.

Forbes, p. 332.

1715. June 16.

ANDREW GORDON and his Factor *against* JAMES CLARK.

No 7.

Courtesy not due in bur-gage lands, because female succession has no place in bur-gage holding.

IN a process of mails and duties at the said Andrew Gordon's instance, against the possessors of some houses in Aberdeen, belonging to him as heir served to his mother, who was infest therein on a disposition from her father, while her brother was alive ;—compearance being made for the said James Clark, who had been married to the mother ; and it being *alleged* for him, that the decreet could not go out, because he possess by virtue of the courtesy, which indefinitely takes place in all heritage, wherein the wife died infest ;

It was *answered* for Gordon, *imo*, That here the wife was no heiress, her right being only acquired *singulari titulo*, and the law says (heiresses), and these have

a rank and dignity to be kept up by their husbands, which singular purchasers have not; and this was found in Lawson against Gilmour, *supra*. 2do, The lands in question are burgage lands, wherein no courtesy takes place.

No 7.

THE LORDS, in respect the tenements were burgage lands, repelled the defender's allegiance founded on the courtesy, and found he could have no title thereto.

Act. Alex. Falconer.

Alt. Leish.

Clerk, Robertson.

Fol. Dic. v. 1. p. 205. Bruce, No 101. p. 123.

1716. June 15.

HAMILTON against BOSWELL.

AN heiress's infeftment, upon a service to her predecessors, being quarrelled by a reduction after her death, upon alleged nullities, in order to disappoint her husband of his right of courtesy, the LORDS found, that the heiress's infeftment not having been quarrelled in her lifetime, was sufficient to support the courtesy, upon this ground of equity, that had it been quarrelled during her life, these nullities might and would have been supplied. See APPENDIX.

Fol. Dic. v. 1. p. 205.

1717. January 3.

ANNA MONTEITH against Her nearest of KIN and CREDITORS.

ANNA MONTEITH being heiress of certain lands which descended to her by her mother, and there being several personal debts to which she would be liable as heir, she, and her father as tutor and administrator, pursue a declarator, 'That it is necessary to sell the above inheritances, or a part thereof, for discharging the debts.'

It was *alleged* for the pursuer's friends on the mother's side, That there was no necessity of a sale, because, by a scheme of the debts and inheritance, it appears that there was a sufficient fund for payment of the yearly annualrents, and a valuable superplus.

It was *answered*, The pursuer's father had right to the inheritance by the courtesy of Scotland during his life, and was not in law obliged to pay either principal or annualrents of personal debts, whereby the inheritance would come to be affected with debts, and wholly exhausted, unless a part were sold; and the father, for the good of the pupil, was willing to concur in the sale, and lose the benefit of his courtesy of such lands as should be sold: Whereupon the question arose, 'Whether a husband possessing by courtesy was obliged to pay the current annualrents of his wife's personal debts?' And the father did allege, that it was of his own good-will, for the advantage of his pupil, that he

No 8.

Courtesy may have place where the defunct heiress was not habitually infest.

No 9.

A husband possessing by the right of courtesy, is liable for the annualrents of the personal, as well as real debts.

No 9.

passes from his right to so much as shall be sold ; but that a husband possessing by a courtesy, is only subject to real debts : In which Lord Stair expresses his opinion very plainly, and makes a parallel betwixt a courtesy and a terce ; and it is certain that a tercer is subject to no personal debts ; and the right of courtesy is a full usufruct, which is subject to no personal burdens.

It was *answered*, The present question is not stated, nor did occur to Lord Stair, nor is there any decision upon record that can clear it ; and therefore it must be determined according to the nature of the husband's right, and the analogy of law. And, *imo*, Although a terce and courtesy do in many things agree, yet not in the present question ; for, by our ancient law, the provision to wives was very much qualified and restricted. The husband could not anciently make a larger settlement upon the wife than the *rationabilis tertia*, which was the liferent of the third part of the heritage he had at the time of his marriage ; he might by paction give her less, as appears by the 16th chapter of the 2d book of the Majesty : And therefore it was very reasonable, that this *rationabilis tertia* should be free of all burdens which did not really affect the subject at the time. On the other hand, the courtesy of the husband was very ample by our ancient law, whereby the husband did not only enjoy the liferent of the wife's heritage, but did even enjoy the honour and dignity of the family, if any did belong to the wife, and had seat in Parliament, and all other privileges that would have belonged to her if she had been a male, both in her life and after her death : So that the husband, by the courtesy, represents the wife's family. From which it necessarily follows in reason and equity, that he should leave the family as he got it ; and if it were not so, the family would be subject to diligences for personal debts, and sunk. And seeing the law or practice have expressed nothing upon this subject, the decision falls to be made according to reason and equity. And the learned Skene, in his notes upon the said 16th chapter of the 2d book of the Majesty, says, ' That the courtesy is *forma cujusdam successionis*.' It is not a proper succession, otherwise the husband would be liable to the principal sums, as well as the annualrents ; therefore he calls it *forma cujusdam successionis*, a kind of succession which subjects him to the payment of all current yearly burdens, where there is not another subject or debtor, out of which or by whom the same may be paid.

THE LORDS found, That the husband, in possession of the courtesy, was liable in the payment of the current annualrents of personal as well as of real debts, to the value of the rents he enjoyed by the courtesy ; reserving to him relief against executors, or other heirs or successors to any other part of the wife's estate, heritable or moveable, which he did not enjoy by virtue of the courtesy.'

Fol. Dic. v. 1. p. 205. Rem. Dec. No 2. p. 3.

1740. *January 11.* JOHN HODGE *against* JAMES FRASER.

THE question betwixt these parties was, whether a husband had right to the courtesy of lands which were acquired by his wife by singular titles, and in which she died infest?

For John Hodge, the husband, it was *argued*, That the right of courtesy was introduced by the common law, founded upon ancient immemorial custom; so that, in order to find in what cases it takes place, recourse must be had to our old law-books, and the opinion of such writers as treat of this subject. In the book of Majesty, this right is treated of; but no distinction is there made betwixt lands to which the wife succeeded as heir to any of her predecessors, and such as she had right to by singular titles; but it is there laid down in general terms, 'When ane man receives with his wife lands, in name of marriage, and begets upon her ane heir, son or daughter, heard cryand, within four walls of the house, and the wife happen to decease, the lands and heritage which pertained to the wife shall remain and be possessed by the husband in during his lifetime;' 2d b. of Majesty, chap. 58. It was a common thing of old, for the wife's father, or other friends, to give with her a part of their lands and estate, in name of tocher, as appears from the 18th chapter of the same book; and if in such cases the courtesy took place, where the wife's right was no more than a disposition from her father, &c. it follows, that the wife's being an heretrix is not essential, provided she dies infest in the lands.

In like manner, in the burrow-law, chap. 44, 'Giff ane man receives with a woman, in name of tocher, ane burgage, and with her begets son or daughter; and it happens the wife to decease, &c. the man or husband shall bruick and possess that burgage, during all the days of his life.' There is not the smallest insinuation here, as if the right to this burgage behoved to be by succession to some one or other of her predecessors, in order to entitle her husband to the courtesy. What is observed by all our writers, touching the affinity betwixt the courtesy and the terce, which likewise took its rise from ancient custom, serves further to illustrate and strengthen this argument. Of old, the wife's terce was a third of the heritage, in which the husband was vest and seased the time of the marriage; but now the terce due to the wife is a third of the heritage in which he died infest, tenements within burgh excepted; and it makes no difference as to the terce, whether the husband's infestment proceeded on singular titles, or in the right of succession, provided, as Craig says, *In feudo eorum diem obiit supremum*; and the same author says, that the courtesy only differs from the terce with regard to the quantity. But *in reliquis eadem lege et paritate terminantur*. In the same manner as a relict claiming her terce is only bound to instruct that she was lawful wife to the defunct, and that her husband died in the fee of the lands, without condescending in what manner the fee was con-

No 10.

The courtesy does not take place in lands acquired by the wife by singular titles. See No 6. p. 3114.

No 10. stitute in the husband ; so the husband claiming the courtesy, is not bound to instruct any thing further, than that a living child was procreate of the marriage ; and that his wife *tempore mortis obiit vestita* in the lands of which he claims the liferent ; and if the courtesy is likewise considered as taking its rise from the rescript of the Emperor Constantine, *lib. 6. tit. 60. cod. de bonis maternis*, which is the opinion of most of our writers, there can remain little doubt. See Wood's Inst. book 2. chap. 1. § 4. And a decision observed by Haddington, where it is said, He who marries a woman who had heritage or annualrent heritable, and procreates a living bairn upon her, will get the curiality, as well of her annualrents, as of her lands, No 1. p. 3111.

The defence for James Fraser was, That seeing the wife acquired the feu herself, and did not succeed thereto as heir to any of her predecessors, the pursuer could have no claim to the courtesy out thereof, as was evidently the opinion of all our lawyers. See Skene *verbo curialitas*, § 2. Craig, *lib. 2. diag. 22. § 42*. Sir George M'Kenzie, *lib. 1. § 6*. Stair, *lib. 2. tit. 6. § 19* ; 22d June 1709, Lawson, No 6. p. 3114. This being the case, it was needless to enquire into the law of England upon this head, seeing they have their own law in that respect, which it was no wonder should differ from ours in some circumstances, even though ours was derived from it, of which, however, no vestige appears ; for instruments of sasine were introduced into our law and custom by King James I. ; and yet our infeftments differ vastly from their feoftments. And it is in vain, in such cases, to argue on the rationality of the thing, namely, that the courtesy ought to take place, without distinguishing how the feu came : for it is a law introduced by our particular customs, and therefore termed the *courtesy of Scotland* ; and whatever the learned Craig may labour with respect to the reason thereof, namely, that it had its rise from the civil law, whereby the liferent of the child's estate belongs to his father, the reason does not apply almost in any shape ; for that the birth of a living child, though it instantly die, founds the courtesy, when it is impossible to pretend that any thing belonged to it ; so that it may justly be said of this, as of many ancient customs, that *non omnibus quæ a majoribus, &c.*

THE LORDS found, That the courtesy only takes place in lands and heritages to which the wife succeeds as heiress, but not in those purchased by her, although she dies infeft therein.

Fol. Dic. v. 1. p. 205. & v. 3. p. 165. C. Home, No 138. p. 236.

. Kilkerran shortly mentions the same case in the following words :

FOUND, That the courtesy takes place only in the wife's lands, to which she succeeded as heiress, and not in lands purchased by her.

Kilkerran, (CONSUEITUDE.) No 1. p. 149.

1781. February 1.

SIR JOHN PATERSON *against* JOHN ORD.

To Mr Ord's claim of being enrolled as a freeholder of the county of Berwick, various objections, of little moment, were offered, which became the subject of a petition and complaint to the Court. When, however, they were thus under consideration, a new *objection* was raised, on this ground : That the claimant's wife had succeeded to the lands in question, not as an heiress, but by singular titles. The Court having ordered memorials on the point, it was

Insisted by Sir John Paterson the objector; That, in these circumstances, the courtesy did not belong to the claimant, as appeared from a numerous train of authorities, and, consequently, that he had no title to be enrolled. The authorities referred to are, Skene, De Verb. Signif. voce Curialitas; Craig, lib. 2. D. 22. § 42.; Stair, b. 2. t. 6. § 19.; Bankton, b. 2. t. 6. § 19.; Ersk. b. 2. t. 9. § 54.; 11th January 1740, Hodge *contra* Fraser, *supra*.

Answered; 1mo, In the most ancient treatises on the law of Scotland, the husband's right of courtesy is laid down, independent of any distinction arising from the wife's having acquired her estate by succession, or by singular titles; Reg. Majest. lib. 2. c. 22.; and Leg. Burg. c. 44. As this distinction, therefore, did not anciently obtain in our law, so, whether we consider the origin or the design of the courtesy, there appears no rational ground for its subsequent introduction. The authority of Craig, when properly understood, is adverse to the distinction. In lib. 2. dieg. 22. § 41. he states the comparison between the courtesy and the terce, in such a manner, as clearly shows he was a stranger to that idea. His words are these : ' Quod ad quantitatem attinet (Curialitas) ' a Triente differt, quod Triens sit tantum *tertia pars* ususfructus totius : At ' Curialitas sive Curtesia est, totius patrimonii quod ad uxorem pertinebat, dum ' moreretur. In reliquis eadem lege et paritate terminantur.' Lord Stair, indeed, has interpreted this author's meaning in a different manner; an interpretation which has been copied after by succeeding writers; and, in the same train, the decision quoted seems likewise to have followed. Thus the weight of these authorities appears to be removed.

Accordingly, in the statutes regulating the election of members of Parliament, particularly the acts 1681, and 12th of Queen Anne, in both which mention is made of husbands rights of voting *by virtue of their wives infeftments*, no such distinction is recognized by the legislature; nay, it is plainly excluded. But,

No 11.

Found in conformity with Hodge against Fraser, *supra*; in consequence of which, the husband had no title to be enrolled a freeholder upon his wife's lands.

No 11.

2do, The last of these statutes seems to confer on husbands the right of voting, in virtue of their wives infestments merely, without any respect to their own patrimonial interest, and independent of the *jus mariti*, or of the courtesy.

THE COURT sustained the objection.' See MEMBER of PARLIAMENT.

Act. Swinton et Ilay Campbell.

Alt. Lord Advocate et H. Erskine.

Clerk, Menzier.

Fol. Dic. v. 3. p. 165. Fac. Col. No 26. p. 48.

See HUSBAND and WIFE.

See APPENDIX.

APPENDIX.

PART I.

COURTESY.

1771. December 10.

ELISABETH PRIMROSE, Spouse of Thomas Brown, *against* ROBERT CRAWFORD
in AIRTH.

JAMES CLUB, by an only daughter, had three grandchildren, Elisabeth, Anne, and Mary Primroses. He disposed to Anne, his house and yard in the town of Airth, and his lands of Potterfield, which amounted to one half of the heritage; the remainder of his lands he disposed to Elizabeth.

Anne was infeft in the subjects; and having been married to Robert Crawford, she, in the year 1760, granted a holograph missive, subsuming, that as there had been no contract, she then disposed to him, as long as he lived, every thing that belonged to her as her grandfather gave it.

Thereafter, in a contract of marriage, she disposed to herself and husband, and the longest liver of them, in conjunct fee and liferent, the survivor always liferenting the whole, her houses and yards in the parish of Airth; but, in this disposition, the lands of Potterfield were omitted. This marriage was dissolved by the death of the wife in 1767, and all her children were dead soon thereafter.

Upon this event, Elizabeth Primrose, as apparent heir of her sister, having brought an action against the tenant in the lands of Potterfield for the rent, compearance was made for Robert Crawford; who contended, 1st, That as there had been several living children of the marriage betwixt him and Anne Primrose, he had a right to the rents of the said heritable subject by the *courtesy* of Scotland; 2^{dly}, Independent of the courtesy, he had a right to the liferent of the whole subjects that had belonged to his wife, in virtue of the holograph missive in 1760.

The Lord Ordinary, by one interlocutor, found Elizabeth Primrose entitled to the rents of Potterfield since the death of the last surviving child of Anne Primrose; to which he thereafter adhered, "in respect that Anne Primrose was not *alioqui successura* to her grandfather in the subjects disposed by him to her, and that the contract of marriage, and not any previous writing, must be the rule to determine what Robert Crawford had right to."

In a reclaiming petition, Robert Crawford, the defender, pleaded:

By the mode in which Club the grandfather had disposed his property, which was by making an equal division, he had done the same thing as if he had disposed the whole to his two grand daughters Elizabeth and Anne, equally *pro indiviso*. If he had disposed his whole lands in this manner, the interest which each sister had, in the half conveyed to her, would, *quoad* two thirds, fall to be considered as a *præceptio hereditatis*; and they could be held as taking no more than the other third, the share which, independent of the settle-

No. 1.

The right of the husband sustained over lands which the wife had got by a disposition, but in which she was *alioqui successura*, and which she was held to have acquired *præceptione hereditatis*.

No. 1. ment, would have fallen to the third sister Mary, by a singular title. When the grandfather therefore allotted to Anne the subjects in Airth and lands of Potterfield, in lieu of the half of his whole heritage, Anne was truly to be considered as taking two thirds of Potterfield under the character of heir.

As the defender's wife was accordingly, to a certain extent, *alioqui successura* in the grandfather's heritage, and could have been connected therewith by a service, in which event it was unquestionable that the courtesy would have taken place, there was no solid reason for excluding that right; where, to save the expense of a service, she had taken infeftment upon a disposition from her predecessors. This doctrine was expressly acknowledged by Stair, B. 2. T. 6. § 19. Bankton, B. 2. T. 6. § 2; and hence the right of courtesy now claimed must, at all events, extend to two thirds of the lands of Potterfield; because so far it was in effect a *præceptio hereditatis*, and which, independent of the disposition, the wife could have taken up as heir at law to her grandfather.

The pursuer answered:

By the consuetudinary law of Scotland, the right of courtesy to the husband was only sustained over subjects in which the wife died infeft as heiress. Skene, *voce* CURIALITAS. From this it followed, that the defender had no claim to the courtesy of the lands in which his wife died infeft; because she died infeft therein, not as heiress, but as *disponce*; characters perfectly different; and as to which it had been found, that the condition of succeeding as heir was not purified by the heir's obtaining a disposition; 25th June 1701, Borthwick, No. 46. p. 2997.

The disposition, in the present instance, by the grandfather, had not been granted merely to save a service; as, had that been the case, it would have conveyed the whole subjects to both the daughters *pro indiviso*; nor would such a disposition have sufficed, as the daughters would not, even in that case, have been infeft as heiresses to their father. The disposition founded on had no connection with the succession that would have been carried by a service to him *ab intestato*. He had thereby made a distribution of his property different from what would have been made by law; there was no ground accordingly for arguing that what had been taken was *præceptione hereditatis*; so that, as the wife's title to these lands was singular, the right of courtesy was excluded.

Some argument was used by the defender upon the import of the holograph missive granted by his wife in his favour; but as the contract of marriage did not confirm, and even differed from that obligation, no regard was paid to it.

The following interlocutor was pronounced: "Find that the petitioner cannot be found on the holograph note subscribed by the deceased Anne Primrose, in respect of the subsequent contract of marriage betwixt him and her, which does not give him right to the liferent of the lands of Potterfield; but find that he has right to the liferent of two thirds of these lands in virtue of the courtesy, as Anne Primrose succeeded thereto *præceptione hereditatis*."

Lord Ordinary, Kennet.
Clerk, Ross.

For Primrose, J. MacLaurin.
For Crawford, Macqueen.

R. H.

Fac. Coll. No. 117. p. 345.

CREDITORS OF A DEFUNCT.

S E C T. I.

Decisions upon Act 24th, Parliament 1661.

1664. *July 8.*

TOWN of EDINBURGH *against* LORD LEY and WILLIAM VEITCH.

IN a double poinding, raised by the Town of Edinburgh against my Lord Ley on the one part, and William Veitch upon the other ; the ground whereof was this ; the Town of Edinburgh being debtor to umquhile Douglas of Morton, in a sum of money, his son confirmed himself executor to his father, and confirmed this sum, which was arrested in the Town's hands by William Veitch first, and thereafter by my Lord Ley.—It was *alleged* for William Veitch, That he ought to be preferred, having used the first diligence by arresting, several years before my Lord Ley ; and having obtained decret against the Town before the Commissaries ; but before it was extracted, my Lord Ley obtained advocacy.—It was *alleged* for my Lord Ley, That he ought to be preferred, because the sum arrested being due to umquhile Douglas of Morton, there was never a decret obtained at the instance of this executor, establishing it in his person ; and therefore this competition being betwixt William Veitch, who was only the executor's proper creditor, and not the defunct's creditor, the defunct's money ought to be applied first to pay the defunct's debt, before the executor's debt, albeit the executor's own creditor had done the first diligence.

THE LORDS found, That the Lord Ley, as being creditor to the defunct, ought first to be preferred, seeing now he appears before the debt was established in the person of the executor.

Fol. Dic. v. 1. p. 206. Stair, v. 1. p. 212.

18 B 2

No 1.

The Lords preferred the creditors of a defunct, before the creditors of his executor, as to all the defunct's moveables that were extant, though the act statutes solely with respect to the heritable estate.

No 2.

Found as
above.1674. December 16. LAIRD OF KELHEAD *against* IRVING and Others.

THE Earl of Queensberry being executor confirmed to the Countess his mother, raiseth a double poinding against her creditors for clearing their preference, especially the Laird of Kelhead, John Irving, and James Borthwick. Kelhead's interest is, that his son being married to Queensberry's daughter, beside the tocher contained in the contract, the Countess engaged for 5000 merks, and after, in her viduity in *anno* 1671, gave a new bond for the same sum, and for security thereof disposed all the moveables that she should happen to have the time of her death, and also assigned the rents; whereupon Kelhead arrested all the moveables in the Lady's own hand about the time of her death, and shortly after her death came to my Lady's house where the moveables were, and took instruments that he entered in possession thereof by his disposition; and when this Earl of Queensberry confirmed the Countess's testament, protested that it should not prejudice his right; he did also obtain decret before the Sheriff against the Earl for delivery of the Lady's moveables, as having right thereto by virtue of his disposition and possession. John Irving's interest is a bond granted by the Lady for L. 1000, bearing *to be justly resting and owing*, and which, he offered to prove, to have been for the funeral expenses of my Lord's burial. James Borthwick's interest was a bond due by the deceased Earl of Queensberry, prior to Kelhead's first bond, and an account of drugs to the Earl when on death-bed.—It was *alleged* for John Irving, That he is a privileged creditor, his debt being for the funeral expenses of the defunct, which is a privileged debt by law and our custom, introduced on a just and necessary ground of humanity, that defuncts be not unburied decently according to their quality; and therefore, whoever expend the funeral expenses, are preferred to all other creditors; so that Kelhead's debt cannot come in competition with this privileged debt, whatever diligence he could do, unless the same had been so complete as to have attained the full effect; and so Kelhead's arrestment is of no effect against him. And albeit a disposition of the moveables by the Lady, and delivery or possession attained in her life would have been sufficient to exoner this Queensberry her executor that he was not under double distress to deliver the moveables to Kelhead, and pay the debts to the privileged creditor out of the same moveables, yet this disposition and pretended possession is not sufficient to transfer the property of the moveables to Kelhead; because the law hath prescribed the method of affecting of defuncts moveables to be only by legal diligences; so that what is in *bonis defuncti* at the defunct's death, cannot be transmitted by possession attained after; and the disposition makes him only a special creditor, which does not exclude the privilege of the creditors for funeral expences, which privilege would not only prefer Irving in a competition against the Earl's

executor, but also against all representing him, so long as the inventory was not exhausted by payment made before citation upon the privileged debt.

THE LORDS found the funeral expenses to be a privileged debt, preferable to all others the defunct's creditors ; and that the possession taken by Kelhead, after the Lady's death, was not effectual, and therefore preferred Irving to him. And likewise found, that James Borthwick's account of the drugs furnished to the defunct while he was on death-bed, had the same effect as funeral expenses ; but would not allow his prior bond, though he alleged it was for drugs furnished upon former occasions.

As to which it was further *alleged* for Borthwick, That his prior bond is yet preferable to Kelhead, to this effect, that he may thereby affect such of the moveables as had been my Lord her husband, his debtors ; because, in competitions betwixt the creditors of defuncts, and the other creditors of executors, for the executor's proper debt, the defunct's creditors are always preferable, when both of them do affect either the goods or debts of the defunct ; *2do*, Borthwick's debt being anterior to the Countess's bond to Kelhead, the same is null by the act of Parliament 1621, against fraudulent alienations amongst conjunct persons ; for the cause of the bond being acknowledged to be a prior bond granted by the Countess for an additional tocher with her daughter, privately granted, besides the contract of marriage, it was null as being a wife's bond, *stante matrimonio* ; and albeit it be renewed in her viduity, yet being posterior to the pursuer's bond, and for an anterior cause not obligatory, the same is null by exception or reply, conform to the said act, it being no real right.

THE LORDS found Borthwick, as the defunct's creditor, preferable to Kelhead, who was only the creditor of the executrix as to such moveables belonging to the executrix at her death, which were the defunct Earls ; and found also, that Kelhead's bond being posterior to this debt, without an anterior onerous cause, might be annulled by the act of Parliament without reduction. *See PRIVILEGED DEBT.*

Fol. Dic. v. 1. p. 205. Stair, v. 2. p. 293.

1675. July 29-

JOHN HALL, late Bailie of Edinburgh, and other CREDITORS of the Relict of JAMES MASTERTON, *against* MARGARET THOMSON, and Other CREDITORS of the said JAMES MASTERTON.

In a double pointing, raised at the instance of Stennismiln, in whose hands the whole goods and in-sight plenishing which were in the house, and possessed by Alice Thin, relict of the said James Masterton, were sequestered, until he should be first paid of the house mail ;—it was *alleged* for the Creditors of the husband, James Masterton, That they ought to be preferred, because he had disposed his whole goods and moveables, in favours of the said Alice, his relict,

No 4-
Found as
above.

No 4.

with burden of his debts; and therefore, whatsoever goods she had by the same disposition, it was really affected with his creditors debts.—It was *answered* and *alleged* for the Creditors of the relict, That she never accepted of any such disposition, nor made use thereof; but on the contrary, any intromission she had was as executrix to her husband, whereby the property of the goods became her's, and she might dispose thereof; likeas she did dispose of the same in favours of Margaret Masterton, her sister-in-law, with the burden of her proper debts; and so her creditors had best right thereto.—THE LORDS did find, That if the said Alice Thin had only right as executrix, that the proper goods and gear which belonged to her husband, and were intromitted with by her, being yet extant, would belong to the husband's creditors; and so preferred them, conform to a former practick in the case of Ley, No 1. p. 3123. where the LORDS did ordain it to be a practick, that the creditor of the defunct should be preferred to the creditors of the executrix as to his goods; but as to any goods that were acquired by the relict herself, after the husband's decease, and did only appertain to her, and were never possessed in common, They did prefer the relict's own creditors to the creditors of the husband, who had never done any diligence to affect the same, nor had recovered decret against the relict as executrix, to constitute her debtor during her lifetime.

Fol. Dic. v. 1. p. 206. Gosford, MS. No 796.

1678. December 19. PATERSON *against* BRUCE.

No 5.

The Lords found, that the axiom *contra non valentem agere, non currit prescriptio*, takes no place in the short prescriptions; and that the three years are not to be understood of *anni utiles*, but *continui*; and therefore, that the act cannot be extended to this case, where the term of payment fell sometime after the defunct's death,

IN a competition betwixt Captain Paterson and David Bruce, both having apprised the lands of Thomas Tweedie, from his apparent heirs;—it is *alleged* for Paterson, That he ought to be preferred, because he has the first apprising and infestment.—It was *answered* for Bruce, That his apprising, though posterior, is upon the defunct's debt, and Paterson's is upon a bond granted by the apparent heir; and therefore, by the act of Parliament preferring the diligences for the defunct's debts, before the apparent heir's, the said diligences being done within three years, are preferable.—It was *replied*, That the foresaid act prefers only diligences for the defunct's debt, being done within three years after the defunct's death.—It was *duplicated* for Bruce, That these three years must be *anni utiles*; but here Bruce could use no diligence, because the term of payment of his debt was not come; and the narrative of that act bears, 'That the defunct's creditors either did not know, could not, nor used no diligence;' and there can be no case more favourable than this, where Paterson's right is upon a fraudulent gratuitous bond of the apparent heir's.—It was *triplicated*, That this statute being correctory of the former law, which did not distinguish the defunct's debt, from the heir's debt, cannot be extended beyond the terms expressed, of diligences done within three years after the defunct's death, and if it were otherwise extended to bonds conditional, or whereof the terms were not come, that

they should have three years after the purification of the condition, which might run for 40 years, it would unsecure all legal diligences and purchasers from heirs, though for onerous causes; and though the apparent heir's bond in this case be gratuitous, the statute cannot be extended, which mentions expressly gratuitous deeds of the heir's, and makes no exception as to these; neither doth the exception of *non valens agere*, continue any prescription, except where it is expressed, as in the prescription of heritable rights, but it hath no effect in the prescriptions of spuilzies or removings.

No 5.
and the creditor had done diligence within three years, counting from the term of payment.

THE LORDS found, That though the apparent heir's bond was gratuitous, the diligence upon the defunct's debt, could not be preferred to a prior diligence on the apparent heir's bond, unless the diligence on the defunct's debt were within three years of the defunct's death, and that no impediment could continue the three years; but whether the defunct's creditors might not reduce the gratuitous bond of the apparent heir, that occurred to the LORDS, and they allowed the parties to be heard thereon; and, after a full hearing, reduced the same.

See HEIR APPARENT.

Fol. Dic. v. 1. p. 206. Stair, v. 2. p. 659.

. Fountainhall reports the same case :

FOUND, That *non valens agere* takes not place in the short triennial prescriptions, but only in that of 40 years; but found, that the three years mentioned in the 24th act of Parliament in 1661, for preferring the defunct's creditors doing diligence against the predecessor's estate after his death, were not to be understood of *anni utiles* but *continui*, and so found that the said act of Parliament cannot be extended to this case.

Fountainhall, MS.

1685. *March.* LORD BALLENDEN *against* WILLIAM MURRAY.

No 6.

IN a competition between the creditors of a defunct and the creditors of an apparent heir, the LORDS found, That the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they could make appear, that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice, or the like; and preferred a disposition granted by the heir to one of his creditors, even within three years after the defunct's decease; albeit the creditors of the defunct had obtained a decret *cognitionis causa* within the three years, the decret of adjudication being after. In this process it was also found, That a disposition granted by the heir to the defunct's creditors, within a year after the defunct's decease, was not quarrellable, seeing the clause of the act of Parliament is conceived in favours of the defunct's creditors; nor yet that

No 6.

such a disposition by the heir to one of his own creditors, is quarrellable by another of his creditors.

Fol. Dic. v. 1. p. 206. Harcarse, (PRESCRIPTION.) No 773. p. 219.

* * See The case of Ker against Scot, *voce* ARRESTMENT, No 22. p. 690. ; and *voce* COMPETENT, No 34. p. 2715., in which the principle of the above decision was recognized.

1711. February 9.

MR JAMES GRAHAM Advocate, against CAPTAINS JOHN M'QUEEN and WILLIAM DRUMMOND.

No 7.

Under apparent heirs, in act 24th Parl. 1667, are comprehended *nominatim* substitutes in bonds or other rights; so that the creditors of the institute are preferable to the creditors of the substitutes.

IN a competition betwixt Mr James Graham, as decerned executor *pro* creditor to Mrs Alison Fletcher, relict of John Graham, general post-master, and Captains M'Queen and Drummod, executors-creditors to Captain David Graham, for the sum of 1000 merks, which the Earl of Strathmore and his cautioner were obliged by bond 'to pay to Mrs Alison Fletcher, and failing of her by 'decease, to the said Captain David Graham, or to Mrs Alison's assignees whatsoever;'—THE LORDS preferred Mr James Graham to Captains M'Queen and Drummond, executors-creditors to Captain David Graham the substitute; and decerned the Earl and his cautioner to make payment to Mr James, he confirming before extract; reserving to Captains M'Queen and Drummond action of recourse against the representatives of Alison Fletcher, the institute and fiar of the bond, as accords; in respect the predecessor's creditors doing diligence within three years, are preferable to the creditors of the apparent heir, act 24th Parl. 1. sess. 1. C. II. whether in a real or moveable estate, under which heirs substitute are comprehended; for albeit substitutes *nominatim* are preferable to the heirs or executors of the institute, 18th January 1625, Wat *contra* Dobie*; 15th January 1630, Thomson *contra* Merkland†; such substitutes may be excluded by the institutes' creditors; seeing substitution or succession takes only place, after payment of the debt of the institute, who was fiar and proprietor, as in this case.

Fol. Dic. v. 1. p. 205. Forbes, p. 494.

No 8.

Creditors of a defunct are preferred before those of his heir. The heir cannot dispoise the estate in prejudice of his

1747. November 26. WILLIAM TAYLOR against LORD BRACO.

ARCHIBALD GEDDES of Essel having died 29th August 1697, Andrew his son and heir apparent sold the estate to Duff of Dipple, 26th of April 1698. The father and son had joined in a bond of borrowed money to John Taylor, for the sum of L. 800 Scots; and this claim lay over many years, but was saved from prescription by the minority of the creditor's representatives. William

* *Voce* SUBSTITUTE and CONDITIONAL INSTITUTE.

† *Voce* HUSBAND and WIFE.

No 8.

predecessor's
creditors for a
year after the
succession
opens to him.

Taylor, grandson to the original creditor, made up a title to the bond, and insisted in a process against Lord Braco as representing Duff of Dipple, concluding a reduction of his right to the estate of Essel, founded on the last clause of the act 24th Parl. 1661, ' That no right or disposition made by the ' apparent heir, so far as may prejudice his predecessor's creditors, shall be valid, unless it be made and granted a full year after the predecessor's death.'

It was *objected*, That the pursuer, in quoting the statute, has left out the most material words, which introduce a new prescription, by providing that the creditors, to have the benefit of the statute, must do diligence against the heir-apparent and also against the real estate, within three years after their debtor's death; therefore no creditor of the predecessor who has not done diligence against his estate within the time limited, can insist upon this act of Parliament nor upon any clause in it; as my Lord Stair, lib. 2. tit. 12. § 29, observes, where he says, ' that the diligence must be completed within three years, such ' as adjudication or apprising, by infeftment, or charge against the superior.' And it is the author's opinion, that this prescription runs as well against the creditors of the predecessor, where the heir-apparent has disposed within the year, as where he has not disposed at all.

In answer to this it was *urged*, That the doing diligence by adjudication within three years, is a clause intended to regulate the preference between the predecessor's creditors, and those of the heir-apparent, which is not the present case. The prohibition to sell *intra annum deliberandi* is pure and absolute, and the predecessor's creditors are entitled to found upon it without necessity of any diligence. And to clear that this is the sense of the statute, the pursuer endeavoured to show, by stating first the defects of common law that were intended to be remedied by this statute; and next, by examining the remedies that were applied. With respect to the first, the defects which the legislature had in view are clearly exprest in the narrative: ' Our sovereign Lord, &c. taking into consideration, that apparent heirs, immediately after their predecessor's death, do frequently dispose their estate in whole or in part, in prejudice of their predecessor's lawful creditors, before their death come to their knowledge, or before they can do lawful diligence against the said apparent heirs, and which disposition the said apparent heirs do often make before they be served heirs and infeft.' Here is an evil, and a great one. During the *annus deliberandi* an heir-apparent is protected from diligence, that he may have time for deliberating whether he will undertake the succession yea or not. It is neither just nor expedient, that, in the mean time, he should have liberty, by disposing of the predecessor's estate, to withdraw from the creditors the subject of their payment. The other evil complained of is, ' That heirs-apparent suffer by collusion their predecessors' estates to be comprised or adjudged from them, for payment of their own proper debts, real or similate, without respect to their predecessors' creditors; though in justice every man's estate

No 8.

' should be liable to his own debt, before the debt contracted by his heir-apparent.'

The evils here complained of are of different kinds, and accordingly different remedies are applied. The natural remedy to the former is above set forth, that no heir, for a year after his predecessor's death, shall be entitled to dispose of his predecessor's estate; and consequently that no man is secure to purchase from him within the year; at least that the purchaser must lay his account either to have the burden of the predecessor's whole debts, or to have the estate taken from him by the predecessor's creditors. The remedy to the latter is borrowed from the Roman law, *tit. de separationibus*, and, upon solid grounds in equity, gives a preference to the predecessor's creditors upon the predecessor's estate. But this preference is declared to subsist no longer than three years; after which period the creditors, whether of the predecessor or of the heir-apparent, shall be preferred according to their diligence. To this branch a limitation is introduced, and a most reasonable one, to give a security to the apparent heir's proper creditors, that, after attaching the estate by diligence, they be not for ever laid open to be beat out of possession by the predecessor's creditors; reserving always to the predecessor's creditors what preference they have obtained within the three years by the deed of the heir-apparent, or by force of diligence.

From this analysis it will be evident, that neither the words nor intendment of the statute can admit the construction given it by the defender. For, *1mo*, as to the letter of the law, it is express without any limitation, ' That no right or disposition made by the apparent heir, so far as it may prejudice his predecessor's creditors, shall be valid, unless granted a full year after the defunct's death.' And it is introduced with the proper narrative of its being unreasonable, ' that he should dispose thereupon immediately, or shortly after his predecessor's death, in prejudice of his predecessor's creditors, he having year and day to advise whether he will enter heir or not.' Here it will be observed, that the limitation upon the preference given the predecessor's creditors in competition with the heir's creditors, mentioned in the former part of the statute, is not here repeated; the words are simple and absolute; nor would it be in the power of judges to supply, were they even of opinion that the statute is so far defective.

2do, The intendment of the statute affords no ground to suppose that the limitation must reach both branches. The limitation in the first branch was introduced for the benefit of the apparent heir's creditors, and of them only, that they might not for ever remain unsecure. The second branch does not at all concern the apparent heir's creditors, who may charge him instantly to enter heir without affording him any time to deliberate. It often happens that an heir apparent has no creditors; and yet he may do great prejudice to his predecessor's creditors, by making private or collusive bargains within the year, sel-

ling an estate at an undervalue, and withdrawing the price, which in his pocket is not obvious to diligence.

And to make the intendment of the statute still more clear, it may be observed, that the first branch supposes the estate to remain with the heir. 'Declares, that the creditors of the defunct shall be preferred to the creditors of the apparent heir in time coming, as to the defunct's estate, provided the defunct's creditors do diligence against the apparent heir, and the real estate belonging to the defunct, within three years after the defunct's death.' Now a limitation upon the predecessor's creditors attaching the estate in the person of the heir, that their preference shall not subsist longer than three years, can never be constructed to regulate a quite different case where the estate is sold and does not remain with the heir.

And *lastly*, had any such thing been intended by the statute, as to secure a purchaser after three years, who buys from the apparent heir during the *annus deliberandi*, the limitation must have been a very different one from what is in the former part of the statute. It must have been in these terms, 'that no declaration or reduction at the instance of the defunct's creditors shall be competent after three years against the purchaser.' And as no such limitation is mentioned, it is clear that no favour was intended for a man who purchases *prohibente lege*; as indeed there ought to be none.

To sum up all in a few words, the statute, in the *first* place, supposing the estate to remain with the heir apparent, affords the predecessor's creditors three years to obtain to themselves a preference upon the estate. *2do*, It absolutely prohibits alienations within the *annus deliberandi*. And *3tio*, If the estate be sold immediately after elapsing of the *annus deliberandi*, whatever preference equity may award to the predecessor's creditors before those of the heir apparent upon the price, it is certain they have no remedy against the purchaser.

As to the citation from Lord Stair above mentioned, it will be evident at the first glance, that his meaning is not to limit within three years the reduction competent to the defunct's creditors against the purchaser who buys *intra annum deliberandi*. Talking of the preference given to the defunct's creditors in competition with the heir's creditors, he observes justly, that the real diligence must be completed within the three years. Then he goes on shortly to hint, that heirs cannot dispose of their predecessors' estates *intra annum deliberandi*, and concludes with this passage, 'Therefore this preference of the defunct's creditors prescribes in three years, or rather in two years; because, within the year of deliberation they cannot pursue unless the heir enter or immix.' This passage relates obviously to the preference given to the predecessor's creditors in competition with those of the heir, and not to the restraint heirs are put under during the *annus deliberandi*, though mentioned in the immediate foregoing clause, which must be considered in some measure as a parenthesis. And it is not uncommon with this author to introduce a hint of one subject in the middle of another, which, in regularity of composition, would do better

No 8. apart. But his Lordship explains this matter more distinctly in another passage, p. 466, at the head, ' This preference of the diligence of the defunct's creditors, to the diligence of the heir's proper creditors, is only, if the same be complete in three years after the defunct's death, wherein the *annus deliberandi* is contained: but in that year the heir can make no valid voluntary disposition.'

' THE LORDS found the reason of reduction relevant and proven.'

Fol. Dic. v. 3. p. 166. Rem. Lec. v. 2. No 86. p. 142.

* * * The same case is reported by D. Falconer :

ARCHIBALD GEDDES of Essel was debtor to John Taylor in Overbridge L. 800 Scots by bond, and dying 29th August 1697, was succeeded by Andrew his son, who, 26th August 1698, within the year of deliberation, and in the state of apparenacy, disposed the estate to William Duff of Dipple.

William Taylor, writer in Edinburgh, as representing John, raised a reduction of this disposition against the Lord Braco, Dipple's heir, upon act 24th, Parl. 1st, Charles II. as being granted by an apparent heir within the year.

Answered ; There is no reduction competent upon this act, unless the predecessor's creditor have done diligence within three years, and that either in the case of a voluntary disposition by the heir, or of diligence led upon his debt, as says Stair, b. 2. tit. 12. § 29. ' By the said statute, dispositions by heirs, or apparent heirs, of their predecessor's estate, are declared not to be valid in prejudice of the predecessor's creditors, unless made a full year after the defunct's death; therefore this preference prescribes in three years, or rather two years, because within the year of deliberation creditors cannot pursue.'

Replied ; The act gives remedy in two cases ; it prefers the defunct's creditors to the heirs, providing they do timeous diligence ; and it annuls voluntary dispositions within the year to their prejudice, whether they do diligence or not, as is distinctly explained by Stair, b. 3. tit. 5. § 23. ' This preference of the diligence of the defunct's creditors to the diligence of the heir's proper creditors, is only if the same be complete in three years after the defunct's death, wherein the *annus deliberandi* is contained, but in that year he can make no valid voluntary disposition.' The other cited passage relates to the preference of creditors, not to the incapacity laid upon the heir, of granting voluntary deeds, though mentioned in the immediately preceding sentence, which therefore must be looked upon as a parenthesis.

Observed on the Bench ; That if diligence were done, the defunct's creditor would be preferred to a disponee without the year, as a creditor of the heir's, and therefore it was to no purpose to forbid dispositions within the year, unless they were null, whether diligence were done or not ; and this case was decided, and is observed by Lord Castlehill in his Practicques, tit. ALIENATION, No 181. as is related by Lord Harcarse in a note after decision 144. viz. Arniston against Ballenden, *voce* HEIR APPARENT.

THE LORDS, 26th November, 'found the reasons of reduction relevant and proven.'

Pleaded in a reclaiming bill; The disposition by Andrew Geddes contained a procuratory for making up titles in his person, and procuring him infeft in the estate disposed, which was afterwards accordingly done, from which time only the purchaser's right was effectual, as flowing from a person infeft; whereas the statute relates only to dispositions from apparent heirs, which must be made good by adjudication.

THE LORDS refused the bill.

Reporter, *Drummore.*

Act. *J. Graham, sen. et R. Craigie.*

Alt. *H. Home.*

Clerk, *Kirkpatrick.*

D. Falconer, v. 1. No 219. p. 303.

. Lord Kilkerran also reports the same case :

ANDREW GEDDES younger of Essel, as principal, and his father, Archibald Geddes of Essel, as cautioner, granted bond for L. 800 to John Taylor in 1689, which bond was preserved from prescription by diligence and minorities.

Archibald Geddes, the father, died in August 1697, and in March thereafter, Andrew, the principal debtor, and apparent heir, disposed the lands of Essel to William Duff of Dipple.

Of this disposition William Taylor, now having right to the said bond, pursues reduction as null upon the 24th act, Parliament 1661, having been granted by the apparent heir within the year; and the LORDS 'found the reason of reduction relevant and proven.'

The question turned upon the construction of the act of Parliament; whereby it was *pleaded* for the defender, That there lay no challenge to the creditors of the defunct, unless they had done complete diligence within three years of the defunct's death. But the LORDS were of opinion, that though, where the heir gives a disposition after the year, the creditors of the defunct cannot plead a preference, unless they have done complete diligence within three years; yet, where the disposition is granted within the year, the creditors of the defunct have no occasion to plead a preference, but are entitled to plead the statutory nullity of the disposition, though they have done no diligence; and notice was taken from the Bench of a remarkable notandum subjoined by Harcarse to his decision, (Arniston against Ballenden, *voce* HEIR APPARENT,) in the following words: "The defunct's creditors doing diligence within the three years, are preferable, even where the heir *disposes after the year*, otherwise the heir's creditors would have more advantage by a voluntary disposition, than they could have by legal diligence, which were absurd; but a disposition within the year would be postponed to the defunct's creditors, though they do no diligence within the three years, such dispositions being prohibited, in so far as they pre-judge the defunct's creditors, where no diligence or time is limited or required." Castlehill's Practicks, tit. ALIENATION, No 81.

Kilkerran, (CREDITORS OF A DEFUNCT.) No 1. p. 150.

1760. February 20.

JOHN RUSSEL, Trustee for WILLIAM BELCHIER, *against* The PERSONAL CREDITORS of the Deceased JOHN HAMILTON of Grange.

No 9.

The creditors of an apparent heir, who has sold his predecessor's estate upon the act 1695, have no claim upon the price till all the predecessor's creditors are paid.

JOHN HAMILTON, heir apparent of the estate of Grange, did, upon the act of Parliament 1695, bring a process of sale of his predecessor's estate in July 1744. The act of roup was pronounced February 1748; and the land being exposed to sale July 1750, William Belchier merchant in London was preferred, as highest offerer, at the price of L. 62,200 Scots.

During the dependence of this sale, Belchier having advanced several considerable sums to Hamilton, knowing him to be heir apparent only, did, after purchasing the estate, convey his debts to a trustee, who having arrested in the hands of Mr Belchier as debtor in the price, produced his interest in the ranking of the creditors, and craved to be ranked upon his arrestment.

This point was considered independent of the arrestment; and it occurred, that when the predecessor's estate is sold by the heir apparent, the price comes in place of the land. The personal creditors of the ancestor can claim, because the land is sold for their behoof as well as for behoof of the real creditors. But the personal creditors of the heir apparent have no claim to the price, because the estate did not belong to their debtor. It is true, that a method is prescribed by law, empowering the creditors of an heir apparent to charge the debtor to enter heir, which will entitle them to adjudge the estate for their payment. But this method is impracticable after the estate is sold; for it would be absurd to charge the heir to enter to an estate which is no longer in *hereditate jacente*. Nor can the creditors of the heir apparent avail themselves of the act 1695, supposing their debtor to have been three years in possession. For, in the *first* place, that act is not made for behoof of those who deal with the heir apparent *qua* such. And, in the *next* place, it gives not to the heir's creditors any claim to the land, making only a passive title against the next heir passing by.

THE COURT next took under consideration the arrestment, with respect to which there was no difficulty. The arrestment of the price in the purchaser's hand cannot, from the nature of it, be extended further than the interest that John Hamilton the common debtor has in the price. Now his interest is as heir apparent only, which is nothing but the surplus, after all his ancestor's creditors are paid. And therefore, this arrestment cannot be brought in competition with any of these creditors.

'The creditors of the ancestor were accordingly preferred.'

Sel. Dec. No 160. p. 220.

1773. February 25.

ADAM BELL, Trustee for the Creditors of JOHN MORTON, the Elder, *against* RICHARD LOTHIAN.

No 10.

The creditors of a person deceased,

JOHN MORTON, the elder, who was proprietor of the lands of Blackbriggs, died in May 1767. Within a year from his death, John, his son, being debtor

to Lothian, granted to him a bond and disposition, under reversion, over Blackbriggs, for a certain sum, Lothian giving a relative missive, whereby he became bound to pay off a debt affecting the said lands, partly owing by Morton the elder.

An action was brought, at the instance of Bell, as trustee for James Kirkland and others, creditors of Morton the elder, concluding, that Lothian's right to the lands should be reduced, in so far as the pursuers are hurt thereby, founding on both clauses of the act 1661. c. 24. But the first branch was not thought applicable to the *species facti*; and the judgment went upon the second.

To the competence of the challenge on the second branch of the act, *objected* by the defender; The law gives no preference to the creditors of a defunct, in competition with the creditors of an apparent heir, as to the defunct's estate, unless they use diligence against it within the space of three years from his death. In default of which, the creditors of the apparent heir have an equal, and may acquire a preferable right to them, either by the diligence of the law, or the act of the heir; which, though done within the three years, and, of consequence, reducible, if the creditors of the defunct use diligence within that time, yet, if the three years are suffered to elapse, these diligences and securities will become valid and effectual.

Answered; The second clause of the act, by which the heir is prohibited to sell within the year, is pure and absolute, and the limitation applies only to the first clause of the act. This very question was determined, in the case *Taylor contra Lord Braco*, 26th November 1747, No 8. p. 3128. where the Court decerned in the reduction of the Noble Lord's right to an estate, solely upon the last clause of the act 1661; for it was not so much as alleged that any diligence was used within the three years.

THE LORDS sustained the reasons of reduction of the bond and disposition, as being granted by Morton, the younger, *intra annum deliberandi*. But, as the defender, if this point should be given against him, had prayed a reservation of all claims competent to him, against the estate of Morton, elder, by virtue of the debts due to him, and securities taken in consequence thereof, the Court remitted to the Ordinary to hear parties on that and some other points.

Act. J. Boswell.

Alt. Crosbie.

Clerk, Tail.

Fol. Dic. v. 3. p. 166. Fac. Col. No 63. p. 153.

1780. June 14. MAGISTRATES OF AYR against QUINTIN MACADAM.

CAMPBELL was debtor to the burgh of Ayr. Within the year after his death, his heir made up titles, and sold lands which belonged to him. More than three years thereafter, but within forty years, the Magistrates of Ayr, for effectuating payment of the debt due to the burgh, brought a process against

No 10.
are entitled to reduce deeds granted by his apparent heir, *intra annum deliberandi*, to their prejudice, on the second clause of the act 1661, c. 24. although these creditors should have used no diligence within the three years from his death.

No 11.
Action for setting aside rights granted by an heir within the year after

No 11.
the predecessor's death, endures for forty years. The second clause of the act 1661, c. 24. is not confined to rights granted by heirs in a state of apparency.

Macadam the purchaser, for setting aside the sale, upon the clause of the statute 1661, c. 24.

The defences *insisted* on by the purchaser were, *1st*, That the action of reduction, not having been commenced within three years after the ancestor's death, was not now competent; and, *2dly*, That the enactment only affected alienations made by heirs when in a state of apparency.

For the arguments on the first point, Taylor *contra* Lord Braco, No 8. p. 3128.

On the second point

The defender *pleaded*; The statute founded on, being of a correctory nature, and creating nullities in the titles of landed property, which are undiscoverable from the public records, ought to receive a strict interpretation. It is entitled, 'An act concerning apparent heirs.' The preamble sets forth, 'That apparent heirs, immediately after their ancestor's death, frequently dispoⁿne their estate, in whole or in part, to the prejudice of their predecessor's creditors.' The hardship thereby imposed on the ancestor's creditors is said to arise 'their not having it in their power to pursue the heir within the year,' which is not applicable to the case where the heir has completed his titles by service. And the enacting clause provides, 'that no disposition made by the said apparent heir shall be valid, unless made a full year after the defunct's death.'

Answered; This statute affects, in the *first* place, diligence by the creditors of the heir, which undoubtedly may take place whether he make up titles by service or not; and, *2dly*, voluntary deeds of alienation by the heir. The title of the statute is general; and as in the first part it must be understood to extend to diligence done against the predecessor's estate after the heir is served, it must in the second be equally applicable to alienations made by heirs in that predicament.

There are in the statute itself expressions which clearly show this to have been the intention of the legislature. Thus it is said, 'that apparent heirs do *often*, before they are served, make dispositions of their predecessor's estate.' And the reason given for the different periods fixed in the first clause is, 'that it would be unjust that the apparent heir, *after he is served, and retoured, and infest, respective*, should, for the full space of three years, be bound up from making rights and alienations of his predecessor's estate.'

But the defender's argument is not only contradicted by the words of the statute, but is totally adverse to its spirit. As a service may be completed by an heir, in some cases, in fifteen days after the ancestor's death, and in all cases within a period greatly short of a year; the duration of this privilege would in this manner be measured, not by the time prescribed in the statute, but by the diligence used by the heir in making up his titles.

'THE LORDS repelled the defences.'

Lord Ordinary, *Gardinston*.

Act. G. *Ferguson*.

Alt. *Rae*.

Clerk, *Tait*.

Fol. Dic. v. 3. p. 166. Fac. Col. No 110. p. 206.

1781. August 2. Ranking of the CREDITORS of CULT.

MR WARDROBE of Cult died in 1775, possessed of an estate of about L. 300 Sterling of yearly rent. His debts, constituted chiefly by bill, for small sums, and due to country-people, amounted to L. 10,000, besides L. 1000 in name of provisions to his younger children.

His eldest son, Dr Wardrobe, who had resided for some time in the West Indies, and there purchased an estate, said to be very valuable, came home a few weeks before his death. Although, from the father's books, which were regularly kept, the situation of his funds might have been known; and although the son himself was then insolvent for a large sum, he entered into possession of his father's estate, took up the bills granted by his father, and gave his own acceptances in their stead, to the extent of L. 7000.

In 1778, the creditors proceeded to diligence against the estate of Cult; among others, one Mr Ross from the West Indies adjudged for the sum of L. 15,000 due by the son. The younger children also led adjudications.

In the ranking of the creditors, those in the renewed bills craved to be preferred, in terms of the statute 1661, c. 24. as creditors of the father.

To this Mr Ross and the younger children *objected*, That, by the creditors having given up the father's bills, and accepted of others from the son, a *novatio debiti* took place, in consequence of which they ought only to be ranked *pari passu* with the son's creditors.

It was *observed* on the Bench, That the son's conduct had been very improper, and that no benefit could arise therefrom to his own creditors, or to his father's younger children.

THE LORDS waved determining the general point, and 'found, from the whole circumstances of this case, that the Creditors of William Wardrobe the father, though they gave up their former securities, and renewed the bills with the son, are entitled to the benefit of the act 1661, and to be ranked as the creditors of the father.'

Against this judgment the younger children *reclaimed*, when they endeavoured to remove the specialities alluded to in the interlocutor, and to distinguish their plea from that of Mr Ross, who was only a creditor to the son. But their petition was refused without answers.

For the Creditors in the renewed bills, *Honyman*.

For Mr Ross, *Henry Erskine*.

For the Younger Children, *Dickson*.

Fol. Dic. v. 3. p. 167. Fac. Col. No 78. p. 134.

1783. February 15.

ANNE MACKAY *against* The REPRESENTATIVES of COLONEL HUGH MACKAY.

ANNE MACKAY, the second wife of William Mackay, was, by their contract of marriage, entitled to certain provisions.

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No 12.

The creditors of a defunct took renewed bills from his heir. They were, notwithstanding, found preferable to the heir's creditors.

No 13.

A bond heritable, *destination*, was found to fall under the act 1661, c. 24.

No 13.

Among other funds belonging to William Mackay, were two wadset rights, and a bond conceived 'in favour of him and his (former) wife, in conjunct fee and liferent, and of the heirs-male to be procreated betwixt them, in fee.'

Those wadsets William Mackay disposed to George, his eldest son, by the prior marriage, to whom, by the conception of the bond, that right likewise was to devolve.

Within a few months after the death of William Mackay, George disposed the wadset-rights and bond to his immediate younger brother, John.

Posterior to this conveyance, Anne Mackay sued these sons of her husband, as being his representatives, for payment of her provisions; and, on the dependence of the action, used inhibition against them both.

Afterwards, John conveyed to Colonel Hugh Mackay, a creditor of his, the wadset rights and bond in security of his debt.

A competition then ensued between Anne Mackay and certain persons representing Colonel Mackay, the event of which was chiefly to depend on the effects of the conveyance by George to John, and of the inhibition used by Anne Mackay against them.

Pleaded for Anne Mackay; As the wadsets and the bond, now the subjects of competition, are both heritable rights, the last, by virtue of its destination 'to heirs-male,' being not less so than the first, the debts of the ancestor are still preferable upon them to those of the heir, notwithstanding the conveyance by the latter within a few months of the death of the former. Both come equally within the sanction of the statute of 1661, cap. 24. which declares, that 'no right or disposition made by an apparent heir, so far as may prejudice his predecessor's creditors, shall be valid, unless it be made and granted a full year after the defunct's death.' As a creditor, therefore, of William Mackay, the father, the claims of Anne Mackay, respecting both rights alike, are to be preferred to those of any creditor of his sons. And her preference has likewise been secured by inhibition.

Answered; *Nomina debitorum* are not the subject of inhibition: Nor is the case altered from their becoming heritable *destinatione*. With respect to Mrs Mackay's preference, as a creditor of her husband, over the creditors of his heirs, the bond being a personal right, falls not under act 1661.

THE LORD ORDINARY reported the cause to the Court, who were clearly of opinion, that the statute 1661 applies to heritable subjects indiscriminately, whether they be such *destinatione*, or *sua natura*.

Some of the Judges denied the competency of inhibition to affect bonds heritable *destinatione* only. The majority, however, appeared to be of a different opinion; though it proved unnecessary to give a direct judgment on that point, the following being the interlocutor of the Court;

'THE LORDS, in respect the bond for 4000 merks, due by Lord Reay, was conveyed by George Mackay to his brother John, prior to the inhibition at the instance of Mrs Anne Mackay, repelled the grounds of preference pleaded by her upon that inhibition; but found, that as George Mackay disposed the said

bond to his brother John within five months of his father's death, the said disposition is not effectual against Anne Mackay, who was a creditor to the father, being contrary to the enactment of the second clause of the statute 1661.*

No 13.

To that judgment, which was brought under review by mutual petitions and answers, the Court adhered; with this only variation, that as it had been omitted to mention, that Anne's Mackay's preference was effectual on the wadset, this omission was now supplied. See INHIBITION.

Reporter, Lord Gardenstone.

For Mrs Anne Mackay, *Elphinston*.
Clerk, *Home*.Alt. *Honyman*.

S.

Fol. Dic. v. 3. p. 166. Fac. Col. No 93. p. 144.

S E C T. II.

Decisions upon the act of Sederunt 1662*.

1685. *March.* CAPTAIN M'KEITH *against* KENNEDY.

No 14.

In a special declarator at the instance of a donatar of escheat, compearance was made for an executor-creditor who had confirmed the subject, prior to the gift or general declarator; *alleged* for the donatar, that as the confirmation could not exclude another creditor doing diligence within six months after the rebel's decease, no more could it exclude the pursuer's declarator raised within the six months.—THE LORDS preferred the executor-creditor, in respect the act of sederunt only concerns creditors, and the donatar is in *causa pœnæ*.

Fol. Dic. v. 1. p. 206. Harcarse, MS. No 2.

* * * See The particulars of this case *voce* COMPENSATION, No 67. p. 2616.

1708. *January 2.*RAMSAY *against* NAIRN.

No 15.

WILLIAM NAIRN of Dunsinnan, being creditor to Young in Dunkeld, confirms himself executor-creditor to him, and thereby uplifts forty bolls of bear and malt he had lying in his barns. Mr David Ramsay being likewise a creditor, he confirms the same subject, with sundry other goods; and, being within the six months of the debtor's death, he pursues Dunsinnan to communicate to him a proportional part of what he had intermeddled with, in respect of the act of sederunt 1662, bringing in all creditors confirmed within six months of the defunct's decease *pari passu*. *Alleged*, Your confirmation is null, because there cannot be two principal testaments, and therefore, I being first confirmed, all

A testament being confirmed by the defunct's creditor, and the same subject being again confirmed by another creditor within the six months, the Lords found, that what-

* The object of this act of sederunt is explained in No 19. p. 3141.

No 15.
ever defect
might be in
the second
confirmation
(as making
thereby two
principal tes-
taments,
which seems
inconsistent)
yet that it
was sufficient
to give the
second the
benefit of
coming in
pari passu
with the first.

you could in law do was to take out a dative *ad omissa*, or *male appretiatata*, or *ad non executata*; but you could not confirm upon the same funds and subjects I had affected before you; and this was not the *habile* way of doing it, but only to get yourself conjoined, or by citing the principal creditor-executor, as is the practice of the Commissaries of Edinburgh, who no more allow two executors by distinct confirmed testaments, than there can be two heirs, not being heirs-portioners; and such a confirmation was found null betwixt Lees and Dinwiddy, *voce* EXECUTOR. Answered for Mr Ramsay; He opposed the act of sederunt, which allows them, within the six months, either to confirm or do some diligence against the principal executor, to give them a right to a proportion of the subject confirmed, or the value of it; and this is as agreeable to the analogy of law as the act 62d, 1661, bringing in all apprisers and adjudgers that are within year and day *pari passu*; and yet every creditor must apprise or adjudge for himself. And the second testament annulled in Lees's case was, because it was a testament dative; but this will not hold in creditors confirming, who, by the act of sederunt 14th November 1679, are obliged to confirm no more than what will pay their own debt. See Stair, tit. EXECUTRY, § 68. and Mackenzie's Institutes, p. 335. And *esto* it were an error, yet being the common practice through all the inferior commissariots, it is sufficient excuse *pro praterito*, as was found in a parallel case, December 14th 1671, Duff *contra* Forbes*, where *error communis quodammodo fecit jus*. And, by the 20th act of Parliament 1696, the founding on an executor-creditor's confirmation does not defend a vitious intromitter pursued, unless he derive a right from him; and the least that can be allowed to his confirmed testament is, that it may have the force, effect, and validity of a citation, which, it is yielded, would have brought him in *pari passu* with the first executor.—THE LORDS found, whatever defect might be in his confirmation, yet it was sufficient to give him the benefit of coming in *pari passu* with the first executor, the expence of the first testament being always deduced *primo loco*; and Mr Ramsay discounting what the inventory confirmed by him extends to more than the 40 bolls of victual confirmed by them both.

Fol. Dic. v. 1. p. 206. Fountainball, v. 2. p. 412.

1723. July.

GRAY against CALLENDAR.

No 16.

CREDITORS of a defunct, after the first six months, are preferable, according to the dates of their citations, against the executor; though it was pleaded by the competing creditor, whose diligence was first completed, that, from the nature of the thing, a citation, which is only a step of diligence, can give no preference, that it is the first completed diligence, not the first inchoated, that is to be considered. See APPENDIX.

Fol. Dic. v. 1. p. 207.

* Stair, v. 2. p. 23, *voce* PROOF.

1729. December 18. HAY against BLACK.

No 17.

A CREDITOR of a defunct having pursued a vicious intromitter with the defunct's effects, the bare citation was found to give him the benefit of the act of sederunt 1682. See APPENDIX.

Fol. Dic. v. 1. p. 206.

1738. February 15. GRÆME against MURRAY.

No 18.

AN executor-creditor having confirmed a bond due to the defunct, containing a greater sum than was sufficient to pay his debt, a competition arose upon the balance betwixt two other creditors of the defunct; each of them having raised a process against the executor-creditor, and insisted in their respective processes, while the executor-creditor was yet in *constituendo*, and had recovered no decret against the debtor in the bond; both citations being after the elapse of the six months; the one insisted for a preference upon his first action; the other pleaded, That citation makes no *nexus realis* upon the subject, and consequently is no foundation of preference; that the first decret must be the rule, and seeing no decret is yet obtained by either, they ought to be ranked *pari passu*. —THE LORDS brought the parties in *pari passu*. See APPENDIX.

Rules of preference of creditors doing diligence within six months of the debtor's decease.

Fol. Dic. v. 1. p. 207.

1742. February 13. Competition CREDITORS of CREICHEN.

No 19.

THE act of sederunt 1662, ordaining, 'That the creditors using legal diligence within six months of their debtor's death, by citing executors-creditors, intromitters with the defunct's goods, &c. shall come in *pari passu* with the other creditors, who have used more timely diligence, by obtaining themselves decerned and confirmed executors-creditors, or otherways,' was not intended to prefer the creditors who had inchoate diligence within the six months, before those who commenced their diligence after it was elapsed; but barely to disappoint those creditors who, by taking the start, have completed their diligence within the six months; which is done by bringing in *pari passu* with them, all other creditors who have done any sort of diligence within the six months. But the competition among creditors, some of whom have done diligence during the six months, others after, is left to the determination of the common law. See APPENDIX.

The same subject.

Fol. Dic. v. 3. p. 167. Rem. Dec. v. 2. No 27. p. 43.

S E C T. III.

Situation of a Factor, and of an Executor, relative to the Creditors of a Defunct.

No 20.

Where a factor was appointed by the Court, for the infant children of a debtor, to manage the estate belonging to their father, a creditor having pursued for payment of a debt, the Lords found, the proper method was, that the pursuer should obtain himself decerned executor-creditor to the defunct-debtor, and confirm the moveable effects in the factor's hands, as still *in hæreditate jacente* of the debtor.

1747. November 25. ELIAS CATHCART *against* WILLIAM HENDERSON.

A FACTOR appointed by the Court of Session for the infant children of Quintin Dick, to manage the funds which belonged to him, was convened in a process by one of Quintin's creditors to pay a debt due by Quintin contained in a bill. The defence was, That there was no passive title upon which he could be made liable; that the creditor had no other method but to take a decree of constitution against the infant children; and thereupon apply to the Court for a warrant against their factor. The LORD ORDINARY having assolized the factor, the matter came before the Court upon a petition and answers. The Judges were all clear, that there could be no necessity of taking a decree upon the passive titles in this case; and that such a decree could not pass, because no passive title could be specified against the children, who were not the intromitters. Elchies was clear, that the action was competent against the factor, as intromitter with the defunct's effects. *See SERVICE & CONFIRMATION.* Arniston thought it hard to give a creditor thus an opportunity of a start in diligence, where there can be no *pari passu* preference; and therefore, he declared his opinion, that the pursuer ought to obtain himself decerned executor-creditor to his defunct debtor, and to confirm the moveable effects in the factor's hands, as still *in hæreditate jacente* of the debtor; to which opinion the plurality agreed. And so it was found, that the creditor must confirm.

Fol. Dic. v. 3. p. 165. Rem. Dec. v. 2. No 83. p. 155.

No 21.

In a competition among creditors of an executor, and a creditor of the person to whom the fund originally belonged; this last was preferred.

1779. February 12.

JOHN TAIT *against* DAVID KAY.

DAVID BERVIE was debtor to Helen Simpson at the time of her death in a considerable sum.

Henry Simpson, her brother, having been confirmed executor, *qua* nearest of kin, David Kay, one of his creditors, charged him for payment, and arrested in the hands of Bervie, debtor of the deceased Helen Simpson. Others of Henry Simpson's creditors followed the same course, and David Bervie brought a multiplepoinding.

Henry Simpson dying soon after, Alison Kay, his relict, expeded a confirmation, as executrix nominate to him; and, among other subjects, confirmed the debt due by David Bervie.

Janet Bervie, a creditor of Helen Simpson, having assigned her claims to John Tait, he obtained decree for payment against Alison Kay, as executrix confirmed to her husband, who was executor confirmed to Helen Simpson. This decree was not obtained till the expiry of near two years and a half after the death of Helen, and the confirmation of Henry Simpson.

Tait produced his decree in the multiplepinding, and *contended*, That, as the immediate creditor of the person, to whom the fund in question originally belonged, he was preferable on it to all the arresters, who were only the creditors of Henry Simpson, the next of kin. In support of this claim,

Pleaded for Tait: The proper funds of a defunct ought to be applied to the payment of the defunct's debts, before they can be touched by any creditor of his executors.—If the executor is the next of kin, a residuary right may remain to him in the defunct's effects, *deductis debitis*; but, until the debts are paid, he is no more than a trustee, and his creditors can have no right to payment out of effects which he only holds in trust.—Accordingly, it is laid down by our lawyers, that the creditors of the defunct are always to be preferred on the executry funds to those of the executor, though the latter should have used prior diligence; Stair, b. 3. t. 8. § 60. Ersk. b. 3. t. 9. § 42. And it is not said by these writers, that there is any limitation in point of time upon the creditors of the defunct in demanding their payment. They are considered as always preferable to those of the executor, as long as there are funds in his hands.

The act 1695, c. 24. does not invalidate this doctrine.—The object of this act was, to give a remedy to the creditors, both of the defunct and of the nearest of kin, where the nearest of kin did not confirm. All the provisions in the act are relative to the case of there being no confirmation. In the first part of it, the mode of attaching the defunct's subjects is pointed out; and it is added, 'With this provision always, that the creditors of the defunct doing diligence to affect the moveable estate within year and day of the debtor's decease, shall always be preferred to the diligence of the nearest of kin.'

It is therefore only in case the nearest of kin does not confirm, and the creditors follow out the course prescribed by the statute, that this provision applies; or that the limitation on the heirs of the defunct can take place.

When the next of kin confirms, he becomes trustee for all the creditors; and, on the established principles of law above mentioned, the creditors of the defunct must be paid out of the subjects before any residue, to which he may be entitled, can be affected by his creditors.

Answered for the Creditors of the nearest of kin: Antiently, in the law of Scotland, as well as in the early period of the Roman law, the heir was so much considered as *eadem persona cum defuncto*, that no distinction was made after the defunct's death betwixt the debts of the one and the other. The estate to which he succeeded was equally liable to be attached by the diligence of his own creditors as those of his ancestors, without any difference but what might arise

No 21.

from the nature or priority of the diligence itself. This was remedied in the law of both countries, and a preference given to the creditors of the defunct; but, in justice likewise to the creditors of the heir, the law, wherever it gives the remedy, restricts it to a limited time.—In the Roman law, the creditors of the defunct were obliged to apply for the *beneficium separationis*, allowed by the *prator* within five years; otherwise the general rule took place.

Previous to the act 1661, c. 24. it appears to have been our law, that, after titles were made up to the ancestor's *heritable* subjects by the heir, no preference was given to the creditors of the ancestor. By this statute, a preference is established in their favour, but, under the provision, that diligence is done against the estate of the defunct by them within three years after his death.—The terms of the statute imply, that both the preference itself, and the limitation attending it, hold equally in the case of an heir entered, and an heir in ap-parency.

In *moveable* succession, it was a doubtful question, prior to the act 1695, whether the creditors of the defunct had a preference? In one decision it was found, that they had; Laird of Kirkhead *contra* Irvine, No 2. p. 3124.—This seems, however, to have been still considered as a point not fixed; *vide* Sir John Nisbet's Doubts, *voce* EXECUTOR. But, by the act 1695, a permanent rule was established.

It appears from the narrative of this statute, that the purpose of the Legislature was to put the moveable succession on a footing with the heritable, so far as circumstances would permit. It sets forth, that the law is deficient, as to the affecting with legal diligence the moveable estate of a defunct, 'in such a manner as a defunct's *heritage* may be affected.' A preference of the same kind, as in heritage, is given to the creditors of a defunct; but the less permanent nature of the subject suggested, that in moveables it should be of shorter endurance; and, accordingly, the statute confines it to a twelvemonth.

This limitation of the preference takes place whether the nearest of kin lies out without confirming, or expedes a confirmation. The doctrine, that executors confirmed are no more than trustees for the creditors, and have no right themselves in the effects, may apply to executors nominate or dative; but not to the nearest of kin confirmed. The nearest of kin is the heir in moveables, and the confirmation no more deprives him of that character, and renders him merely a trustee, than a service as heir reduces an heir in heritage to that state. He must indeed discharge the burdens affecting the moveable estate to the extent of the inventory, and he will not be benefited by the succession beyond the free residue. In both respects, the case of an heir with respect to heritage, is entirely similar.

But, whether the nearest of kin after confirmation be considered as a trustee, or as *hæres in mobilibus*, the statute 1695, both from the terms and intendment of it, reaches to the case of the next of kin confirmed, in like manner as the

statute 1661 reaches to the case of an heir served. The *heritable* and *moveable* succession must be put on the same footing, agreeably to the intendment of the statute.

No 21.

THE COURT found, ' That Mr Tait is entitled to be preferred to the other competitors on the funds *in medio*, for his claims in right of Janet Bervie, as it is a debt due by Helen Simpson, to whom the funds belonged.'

Lord Ordinary, *Ankerville*.
Clerk, *Gibson*.

Act. *Armstrong*,Alt. *Rolland, Sinclair*.

Fol. Dic. v. 3. p. 165. Fac. Col. No 69. p. 129.

See HEIR APPARENT.—SERVICE and CONFIRMATION.—EXECUTOR.—APPENDIX.

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DAMAGE AND INTEREST.

1583. July.

CUMING against RUTHVENS.

THERE was a supplication given in be Mr Archibald Cuming, making mention, how that he and Cuming of Condie, his brother, became cautioners for the young Laird of Ruthvens, to Margaret Erskine, sometime spouse to the said young Laird, that he should not molest nor trouble her, nor her tenants of the lands that appertained to her by right of her conjunct-fee, but that she should peaceablie bruik and possess the same; and, if he did in the contrare or contravened, that she have it referred to her oath, the cost, skaith, and damage that was done to her, but any farther process, *nam ita cavēbat contractus*. The said Mr Archibald being chargit and put to the horn, fled to the girth of the Canongait and Abbey and Halyrudhouse; and being there, Mr John Graham, justice-depute, be letters of caption, tuik him furth of the gifth and wairdit him in the Castill of Edinburgh, and thairfor the said Mr Archibald compleint into his bill and desyr't to be put at libertie, unto the time that liquidation was maid of the cost, skaith, damage and interest, whilk was done to her be molestation of her umquhil husband, and the same being liquidate, offered sufficient caution for payment of the same. The question being reasonit *pomeridianis horis inter dominos*, some was of the opinion, that the desire of the supplication ought to be granted be reason of the daily practic, that when any person is obliged to another, either principal or cautioner, if the matter is not liquidate, or yet is *factum præstabile* be the party, there will ay suspension be grantit unto the time the liquidation be made, upon sufficient caution, as the compleiner offerit the same; for utherways, the party and compleiner might ay be halden in waird and perpétual prison for the not fulfilling of the thing whilk was uncertain, and not in his power to do. To this was *answered* be others of the Lords, that in the present case the *interesse* was referred to the party's oath, but any farther process, as it was conteinit into the said contract; and therefore, that remeid might be fund to the compleiner that she being called in judiciarie before the Lords to give her oath, was ready to give the same, as she had given

No 1.

No probation of a real *interesse* was allowed, where a conventional one was stipulated.

No 1.

her bill thereupon, and so be present payment or consignment of the said soume; quantity deliverit be her oath and conscience, he might be put to libertie. To this was *answerit* again, that, or the quantity be referred to her oath, she behoved to prove the molestation; for, there was no other probabilitie of the molestation, but the narrative of her supplication. To this was *answerit*, That the matter was here *in executione parata* upon ane contract registrate and execution raised thereupon, and for not fulfilling of the whilk, the cautioner had passed to the horne, and where that the party is obliged to prove molestation that *in nova actione inchoata*, and also after the meaning of the law *ut expresse fact. in L. in actio. ff. de in lit. juran. et Alex. consil. 214. lib. sept. quod contra dolosum juramentum probatur interesse*, and the said L. of Ruthvens who had committed so many spoliations and depredations, and also his cautioner, who had gone to the horn for the same, could not be esteemed others but *dolosi committendi contra quos ex sententia predict. jurament. partis probatur interesse*. The matter being reasoned and dissented among the Lords, *pomeridianis horis magna contentione domini maxima ex parte* refused the desire of the said Mr Archibald, albeit the day before it was granted, *nam coram dominis consilii unusquisque sua habet fatalia*.

Fol. Dic. v. 1. p. 207. Colvil, MS. p. 377-

No 2.

A carrier's horse, hired to carry 16 stone, dying by being overloaded, the merchant having put 20 stone on his back, the Lords sustained process for the price, but not for the profits that might have been made of the horse.

1610. July 18.

STRATON against —.

A CARRIER having agreed to carry a merchant's packs to Wigton, pursued the merchant for the price and profits of his horse, because he died and was bursen in default of the merchant, who promised only to make the packs of 16 stone weight, and yet made them of 20 stone weight; — THE LORDS sustained the summons (albeit the owner of the horse laid on the packs and drove the horse,) for the price of the horse, but not the profit; it being verified by the merchant's oath, that he promised to make the packs only of 16 stone weight, and no heavier, and that in contrary thereof he made them of greater weight.

Fol. Dic. v. 1. p. 208. Haddington, MS. v. 2. No 1947.

1670. February 19.

LAUCLAN LESLY against GUTHRIE.

No 3.

A cargo of wheat being damaged by the shipmaster's fault; yet as the victual remained in specie, and was not

LAUCLAN LESLY having fraughted a ship belonging to Bailie Guthrie in Dundee, to carry a loading of wheat and oats from Athole to Leith, the skipper did put in by the way at Dundee, and there the ship received a crush by another ship, whereby the salt-water entered amongst the victual; and thereupon the owners and skipper caused disloaden the victual, and put it up in lofts; and Bailie Guthrie, the next day after the crush, gave notice to Robert Lesly in Dundee, Lauchlan's correspondent, and who made the bargain with him, to

make it known to Lauchlan what had befallen the ship and loading ; who, within two days after, came to Dundee, and was required to receive the victual, which he refused ; and, by the probation adduced in this cause, it was found that it was the skipper's fault, that he had put in to Dundee ; and so he and the owners were found liable for the damage and interest of the merchants ; and that the merchants should be obliged to take back that part of the victual that was unspoiled, and the owners should be liable for the price of the whole, as it would have given at Leith, if the skipper had kept his course, deducting the price of the sufficient victual as it now gives ; and a commission being granted to certain persons in Dundee, to visit the victual, and to see what condition it was in, they reported that 36 bolls of it were sufficient marketable wheat, and that the oats was damnified in 20s. the boll ; and as to the rest, two reported that it would yet be bisket for ships, or household servants, two reported it was spoiled but spake nothing further. The question arose to the LORDS, upon the commission, at the advising thereof, whether the owners and skipper should be liable for the damage that was done before the advertisement given to the merchant, or for the damage that ensued thereafter ; because the victual being laid together, without separating the wet from the dry, had het and spoiled thereafter ; and if it had been separated at first, the damage would have been very little ; and so the question was, whether the owners and skipper were obliged to have separated the wet from the dry, and so to have offered it to the merchant ; or if the offer in general to the merchant to receive the victual, was sufficient, though he did not desire them to separate the wet from the dry ; or that they did not offer satisfaction, or security for the damage of what was wet.

No 3.
wholly corrupted, but appeared to be useful for ship bisket, and as the property of it still remained in the merchant, and the owners were only liable for damage ; the LORDS ordained the merchant to receive the wet victual, and the owners to pay him what it was worse than the price it would have given at Leith, if the voyage had held.

THE LORDS found, That seeing the damage had fallen after, and through the occasion of the skipper's delay, he and the owners were obliged to separate the wet from the dry, and to have used diligence to prevent future damage ; wherein having failed, they found them liable for the whole damage, both before and after the offer ; the next question arose was, whether the skipper and owners were obliged to take the spoiled victual, and pay the price thereof, as if it had been sufficient, or if the merchant was obliged to take it, and the owners to make up the damage.

THE LORDS found, That seeing the victual remained yet *in specie*, and was not wholly corrupted, but by the report appeared to be useful for ship bisket, and seeing the property thereof still remained in the merchant, and the owners were only liable for damage ; they ordained the merchants to receive the wet victual, and gave commissson to some persons to report what was victual, and gave commission to the same persons to report what it was worse than the price it would have given at Leith, if the voyage had held.

Fol. Dic. v. 1. p. 208. Stair, v. 1. p. 672.

1675. June 16.

GRAY *against* COCKBURN.

No 4.

THE LORDS found, in the case betwixt the Laird of Cockburn and Mr William Gray minister at Duns, That Cockburn, being liable to pay certain bolls of victual betwixt Yule and Candlemas, might have paid the same upon Candlemas day; and that as he might have paid the same, he might have made offer thereof; but that in all cases of that nature, persons who are liable, and do make such offers, are not thereby liberate as to the greatest prices, unless the party be *in mora* to receive the victual, either the time of the offer, or six days thereafter.

Reporter, *Castkhill*.Clerk, *Monro*.*Fol. Dic. v. 1. p. 207. Dirleton, No 267. p. 129.*

1675. December 14.

LIEUTENANT-COLONEL MERCER *against* LADY ADIE.

No 5.

Action sustained for damages, on account of a breach of a verbal treaty of marriage.

LIEUTENANT-COLONEL MERCER pursues the Lady Adie, *alleging*, That he was invited by her to come to Scotland, in order to a match betwixt his son and her daughter, heretrix of Adie; who, by the tailzie made by her father, is obliged to marry one of the name of Mercer; and the pursuer being near to the family, and of the name, when he came to Scotland the Lady communed and agreed with him, that he should go to Ireland and bring over his son, and should provide security for L. 2000 Sterling, to be answered in Scotland, to be contracted, for paying off the debts and portions of the family, and did employ him to go to Ireland to that effect; which he accordingly performed, and raised the sum that belonged to his son by his mother, and brought bills into Scotland for answering it here, and brought over his son to Scotland, leaving his employment as a merchant at Dublin, and coming in an equipage suitable to the son of Adie, and when he came, the Lady suffered him not to have access and converse with her daughter; and therefore craving his expenses in this negotiation, in which he was employed by the Lady, and that for proving the same, several of the Lady's servants and friends should be examined *ex officio*.—The defender *alleged*, That the libel is not relevant; *imo*, Because an invitation, motion, or preposition of a match, could be no ground to oblige the Lady to any damage, in case the match succeeded not; for albeit the employing of an unconcerned person might infer a mandate, yet a proposition made to a father for his son, of so honourable and profitable a match, cannot be interpreted a mandate, but at most a counsel, which is not obligatory; and even mandates are gratuitous; but the expectation or hope of such a match, was a sufficient recompence of all the pains and charges, and so could import no more; but that if the parties, upon conversation, were satisfied the match

should proceed ; yea though the Lady had given assurance, it could import no more. And as to the manner of probation, it is unquestionable by law, that promises and mandates are only probable by writ or oath.—The pursuer *answered*, That albeit he was a father, yet his son was forisfiliate, and had a several patrimony by his mother ; and so was but as another friend employed by the Lady, which must import that it was upon her expenses ; neither doth he crave any benefit by gratification, but what he expended and was loser ; especially, seeing the Lady, who brought on the match, did most unfairly break it off, by hindering access and converse betwixt the parties, though nothing can be pretended against the person, quality, or means of the pursuer's son, there being few or none of the name of Mercer that could bring in L. 2000 Sterling. And as to the manner of probation, he being a stranger, residenter in Ireland, unacquainted with the municipal laws of Scotland, he ought to have such probation as is competent by the common law of nations, whereby controversies may be proven by unsuspected witnesses ; and here the witnesses are the Lady's own friends and servants.—It was *replied*, That in all contracts, *locus contractus* is to be respected, as to the manner of making it effectual, and the pursuer should have taken counsel here how to secure himself ; but though there had been an agreement betwixt all parties having interest, yet before it was redacted into writ, there was place to resile.—It was *duplicated*, That there was place to resile from the marriage, but not from the mandate or employment, which required no writ, and could not be resiled from after it was performed.

THE LORDS sustained the libel and reply, only in these terms, That the Lady employed the pursuer as is libelled, and gave assurance of his expenses, or that he should not be a loser, or otherwise it was understood as a proposition upon his own hazard ; or likewise, that the Lady employed him as is libelled, and did hinder access and converse without a reasonable cause, as an act of fraud to infer damage and interest ; and found the libel only proven *scripto vel juramento*, but allowed the Lady to depone in presence of the witnesses, whom the pursuer would have had examined *ex officio*. See PROOF.

Fol. Dic. v. 1. p. 208. Stair, v. 2. p. 381.

* * * Gosford reports the same case :

THERE being a pursuit raised at the instance of Colonel Mercer, against the Lady, upon this ground, That Sir James Mercer of Adie, having no heirs-male, but only daughters, did dispoise his estate to his eldest daughter ; she naming a gentleman of the name of Mercer, who should have reasonable fortune, to pay his debts, and to give reasonable fortunes to his other daughters. The Lady, considering that there was none of that name in Scotland, who had a sufficient fortune for performing of these conditions, did send the deceased Laird of Adie's natural son to Ireland, and engaged Lieutenant-Colonel Mercer to come to Scotland, to treat with the Lady for a marriage betwixt his eldest son, bear-

- No 5. ing that name, and her eldest daughter; and accordingly, the Lieutenant-Colonel having come, and treated with the Lady concerning the said marriage, she did agree with him that he should return to Ireland, and bring over his son in good equipage, and provide L. 2000 Sterling, to pay in Scotland for relief of debts, and providing of the other daughters; which accordingly he did perform, and brought sufficient bonds, payable to the friends of Adie, for that sum, upon the perfecting of the marriage, which was altogether obstructed by the Lady's means; in so far as, when his son came, she would not suffer him to see the young lady he should have married; whereupon the Lieutenant-Colonel concluded, that she should be liable in damage.—It was *alleged* for the Lady, That there being nothing but a verbal treaty, and any assurance that was offered, was only that she should be a friend, finding the young gentleman qualified and provided, as said is, there being no contract of marriage drawn up or subscribed, nor no written obligation to refund the pursuer's expenses, in case the marriage did not succeed, any such verbal communing was not obligatory by our law to infer damage; and at most, being but an offer of friendship, which, if it were sustained to be a ground of damage, it would open a door to infinite pleas; and no verbal assurance of a mother, or any other friend, who, upon better consideration, may alter their resolution, ought to be binding; especially in the contract of marriage, which depended upon the young lady's own inclinations, or those whom she was advised to follow; and the pursuer ought to have taken his own measures, and have raised a contract or minute, to be subscribed; otherwise, what he did he did it upon his own hazard; and albeit it be alleged, that she gave full assurance for completing of the marriage; yet that was only probable *scripto vel junamento*, and to make her liable in a great sum of money.—It was *replied*, That the pursuer being a stranger, and brought over of purpose from Ireland at her desire, having no other business in Scotland, and getting full assurance, upon performance of the conditions required, that the marriage should be solemnized, he was in the case of mandatories, who in law is well-founded to pursue for all damage and interest against the mandator, whose mandate he follows; especially where the Lady, who gave him commission, did obstruct the perfecting of the bargain, for which she gave him warrant; and he being a stranger, did not know what parties to deal with for drawing up a contract, but did rely upon her faith. And as to the manner of probation by the law of Scotland, he being a stranger, could not know the same; but it was sufficient that he did offer to prove, by his own chamberlane and domestic servants, and the deceased Laird of Adie's natural son, whom she could have no reason to suspect, that she did truly give him that commission, and sufferance libelled; and after he parted from her, and was upon the west borders to go for Ireland, she wrote a letter to one who did convoy him, to intimate to him, that he should haste and make no delay; so that the manner of probation, by such confident persons, ought to be received, as being conform to the law of Ireland and other nations.—THE LORDS having seriously consi-

dered this case, found, That it was a dangerous preparative to sustain actions upon verbal treaties of marriage, there being neither a subscribed contract nor mandate; but there being this singularity, that it was libelled that the Lady had given full assurance, and had engaged the pursuer to be at great charges in the prosecution of that marriage, and notwithstanding had obstructed the same, all being performed that she had required, they did sustain the action, reserving to modify after probation: But as to the manner of probation, found it only probable, by the Lady's writ or oath; and in case it were referred to her oath, they did grant diligence to cite such as were her confidants, and named to be present. At her deposition she granting that she did give assurance; they found it probable by witnesses, that she did impede and hinder the young gentleman to see the young lady, and so stopped the marriage.

Gosford, MS. No 820. p. 517.

No 5.

1687. January 25. SPENCE and WATSON against ROBERT ORMISTON.

THE case of Spence and Watson *contra* Robert Ormiston, was reported by Kemnay.—Ormiston had sold Spence a teirce of brandy, and was to deliver it to him in his shop at Edinburgh; but the waiters seized on it, and it was confiscated, being stolen in at the port without paying the town's dues; and he being forced to redeem it by paying the triple excise, pursued the seller for refunding his damage, which he restricts to what he actually gave.—*Alleged*, After tradition the peril is the buyer's.—*Answered*, You sold it *prout optimum maximum*, free of all incumbrances; unless you offer to prove, that the buyer took it with the hazard; and the seizure arose from a deed of your's, in not paying the custom. The question was, On whose peril the brandy was confiscated? —THE LORDS found it was the seller's, he being obliged to deliver it in the buyer's shop in Edinburgh; but restricted it to the true damage sustained by him, and not to what he might have made by retailing it. This was reclaimed against by a bill.

Fol. Dic. v. 1. p. 208. Fountainhall, v. 1. p. 442.

No 6.
Goods were seized before delivery, and redeemed by paying triple excise. The purchaser found entitled to damages to the extent only of what he had actually paid, not for any profit he might have made.

1710. June 20.

SIR GEORGE HAMILTON against WILLIAM DUNDAS of Airth and his LADY.

THE Laird and Lady Airth having assigned to Sir George Hamilton several debts due to them by Alexander Hamilton of Grange, particularly an adjudication led upon the estate of Grange in February 1678, in so far as might be extended to 19,000 merks owing by them to Sir George; and Airth having obliged himself and his heirs to deliver the adjudication betwixt and a certain day, under a

No 7.
A person was bound to produce an adjudication on a third party's estate by a pre-

No 7.

cise day, under a penalty, over and above performance. Having made diligent search for it, he was found liable in the sums only which were lost by the want of it.

penalty, by and attour performance; and being charged by Sir George upon the said obligation, to deliver the adjudication; he suspended upon this reason, That they had made all possible search for the adjudication, and could not find it, and the charger could ask no more than *damnum et interesse loco facti impræstabilis*.

THE LORDS found the suspenders liable only for damage and interest, in so far as the charger's right to the sums in the adjudication, might have been effectual against the estate of Grange, had the adjudication been delivered in due time.

Fol. Dic. v. 1 p. 207. Forbes, p. 411.

1712. November 18.

ANNA NAIRN, Daughter of the deceased DAVID NAIRN, Doctor of Medicine,
against THOMAS and ANTONIA BARCLAYS.

No 8.

The Lords found action not competent against an heir, for damage sustained by the predecessor's relict, through the want of a jointure-house all the years of her widowhood, occasioned by the not performance of her husband's obligation in her contract of marriage, to build and repair the house for her accommodation, unless the heir had been required to build and repair in her lifetime; because *damnum et interesse* can only be due after *mora*, and there was no *mora*, since there

By contract of marriage betwixt Sir David Barclay of Collairny, and Dame Anna Riddel his spouse, the Lady was provided to a liferent of the lands of Pitblado and others; and because the house of Pitblado was ruinous, and had not been inhabited for many years before, Sir David obliged him and his heirs to build and repair the same, with all easements and office-houses necessary there-to, for accommodating the said Dame Anna Riddel in a jointure-house, in case she survived him. Sir David died in the year 1655, leaving the house of Pitblado in no better case than it was the time of the contract of marriage; and the Lady, without requiring her husband's representatives to repair it, provided herself of a dwelling-house elsewhere; after whose decease, Anna Nairn, as deriving right from Dr Nairn her father, to whom the Lady had assigned her liferent, with the whole obligations in her contract of marriage, pursued Thomas and Antonia Barclays, as representing Sir David, for payment of 5000 merks yearly from the 1655, when Sir David died, till Martinmas 1686 inclusive, as the damage sustained by the said Dame Anna Riddel for want of her jointure-house all that time.

Alleged for the defenders; The obligation to repair consisting *in facto* pres-table at no precise time, they could not be pursued for damage or interest, unless they or their authors had been *in mora*, which cannot be pretended; seeing they were never required in the Lady's lifetime to put the house in repair; and if by the civil law *debitor in obligatione quæ in faciendo consistit*, who could not be pursued precisely *ad factum præstandum*, but only for damage and interest arising from his *mora*, might still redeem himself from that, *præstando factum*, or by performance at any time *ante litem contestatam*, L. 84. ff. de V. O.; much more the defenders, who could not be *in mora* till requisition, ought to be assoilzied from damages by our law, which obligeth a man *præstare factum* by

the compulsors of horning and caption; and where the fact comes principally, both *in obligatione et prosecutione*, and the damage and interest is only an accessory penalty, arising from the debtor's *mora*.

Replied for the pursuer; In all obligations *ad factum præstandum, loco facti succedit interesse*, and *dies interpellat pro homine*; now in the case of this obligation to build and repair the Lady's jointure-house, the term of performance being the husband's death before her, the damage takes place against his heirs, who failed to perform, and is to be liquidated with respect to the Lady's quality, and the convenience a jointure-house upon the lands would have afforded for the use of her tenants, and uplifting the rents. The L. 84. ff. de V. O. doth concern the building a house to one in property, and doth not liberate from damages sustained before performance, after he who stipulated to build was *in mora*, but only from after damages; as is clear from Cujacius's observe on that law, viz. *si propter moram actor jam ante litem contestatam damni aliquod senserit, non potest liberari offerendo*; so that the text cited out of the law doth not meet the case, in so far as Sir David's obligation was not to build and repair a house to his Lady in property, but only for a habitation to her and her family during her survivance. The pursuer doth not insist *ad factum præstandum*, but for damage the Lady sustained through not performance the years she lived after her husband; which can never be satisfied by an offer to build or repair the house now after her death, when she cannot enjoy it.

Duplied for the defender, 1^{mo}, Albeit in obligations to be performed at a fixed day, *dies interpellat pro homine*; yet where no day is adjected, interpellation or requisition is necessary to produce the common effects of *mora* or delay. The maxim *quod sine die debetur, præsentis die debetur*, has indeed this effect, that the creditor may immediately demand performance; but requisition must be used in order to put him *in mora*, so as to be liable to damage and interest for not performing. And albeit the day of Sir David's death, implied in the nature of the obligation, was a time when the creditor might demand performance; the husband's representatives are not to be reckoned *in mora* from that day, till they were duly interpellated; 2^{do}, Sir David Barclay's obligation to repair a house to his Lady to dwell in after his decease, was conditional, at least conceived *in diem incertum, qui pro conditione habetur*; and in conditional obligations, purifying the condition doth not put the creditor *in mora*, without interpellation, *Boekleman, Com. in tit. ff. de Usur.*

THE LORDS found, That the obligation could produce no action at the assignee's instance, unless requisition was made in the Lady's lifetime; and that the damage, through the want of a house, could only be acclaimed from the date of the requisition.

Fol. Dic. v. 1. p. 207. Forbes. p. 631.

No 8.

was no requisition; and though requisition had been made, damages would have been due only from the date thereof.

1714. November 4.

CAMPBELL of Horsecleugh *against* The LADY Little Cesnock.

No 9.

A husband having granted a disposition to his wife of his whole moveables, and a bond of 3000 merks payable by his heir, with a quality, that if the debts due to him exceeded the debts due by him, the bond should be proportionally abated; the relict's intromitting with the defunct's writs without inventory, found to infer a presumption, that the debts due to the defunct exceeded the debts due by him to the value of the sum in his bond, or that the same were accepted by the relict in full satisfaction.

CAMPBELL of Little Cesnock disposed to his Lady the whole debts due to him, and all his moveable estate, with the burden of his debts; and, further, granted her a bond of 3000 merks to affect his heritage; but with this quality, that in case the principal sums of the debts due to him did exceed the principal sums of the debts due by him, that the said bond of 3000 merks should be abated proportionally in whole or in part. Some time after Little Cesnock's decease a warrant was procured from the Sheriff-depute to inventory his writs, which was not done; but his closet and cabinets were sealed by the person sent to inventory, and some friends, the Lady being absent.

Campbell of Horsecleugh, Little Cesnock's heir, pursued a reduction of the 3000 merk bond, on this reason, that the same was qualified, and did provide, that if the debts due to him did exceed the debts due by him, the same should be extinguished or restricted; and subsumed, that the bond was extinct, because the Lady had taken upon her to intromit with the writs *per aversionem* without inventory or authority of a Judge, and therefore it must be presumed, that the defunct's free principal sums did at least amount to the sum in the bond.

It was *alleged*; 'The Lady's disposition did bear a power to intromit with the subject disposed, so that *non versabatur in illicito, esto* she had broke open the seals and meddled with the writs. *2do*, She had exhibited all the writs upon oath, or condescended what was become of such as were not exhibited, for which she would hold count, and this deposition being in the same process at the pursuer's instance, *juratum est. 3tio*, The Sheriff's warrant was to inventory, and not to seal; yet the goods were sealed, and not inventoried, which was unwarrantable; and several doors of the house were so sealed up, that the Lady could not have access to her own liferent house at her return, and therefore might lawfully break up the same.

It was *answered*; *1mo*, The clause with power to intromit, was a clause of style which was understood *legitimo modo. 2do*, The pursuer does not quarrel her intromission as vitious, because the whole moveables were disposed to her, but founds upon the quality of the bond, which necessarily implied an obligation upon the defender to intromit by authority and inventory, that it might appear whether or how far the debts due to the defunct did exceed the debts due by him; and the Lady having deprived the heir of the means of discovering the extent of the defunct's debts, she must be understood to have taken the disposition to the moveable debts *per aversionem*, in satisfaction of her whole claim. *3tio*, The defender's oath was not *deferente adversario*, as to the present debate, but was in an exhibition at the pursuer's instance, as the defender's husband's heir, before her right to the moveables and debts did appear. *4to*, The

seals being put on in presence of friends, ought not to have been removed, and the warrant to inventory did import that the writs might be secured till they were inventoried. But however, it was the defender's part to have procured a warrant to inventory, and to have intromitted only at the sight of a Judge. 5to, As to the indiscreet sealing of the doors of the rooms, the fact is denied. But supposing it, the Lady might either have obtained the seals to be removed by the warrant of a Judge, or at least in presence of famous witnesses, and obtained new seals to be put upon the writs.

'THE LORDS found the Lady's intromission with the writs *per aversionem*, without any inventory, relevant to infer a presumption that the debts due to the defunct did exceed the debts due by him to the value of the sum in the Lady's bond, or that the same were so accepted by her; and repelled the allegance founded upon her oath in the exhibition.'

Fol. Dic. v. 1. p. 208. Dalrymple, No 113. p. 157.

1724. January 23.

ROBERT BUNTYNE of Ardoch and MR THOMAS FLEMING against WALTER BLAIR and COMPANY.

By charter-party in August 1721, Buntyn and Fleming let out their ship, the Cathcart, to Blair and Company, for a voyage from Clyde to Maryland; where after her arrival in Choptank river, she was to lie for the space of 90 days for taking in the merchant's cargo of tobacco; and the merchant's freighters were, by the same charter-party, bound to pay 30s. of demurrage, for each day the said vessel and company were detained through the said freighters, or their supercargo, or their factor's default, longer than the lie-days agreed upon.

The ship arrived in the said river the 4th February 1722, whereby her lie-days expired the 4th of May; at which time the cargo not being fully provided, the master unmoored the ship as a signal of her readiness, and he acquainted the supercargo that he was ready to sail, and that he was going to Annapolis to take a protest against him in the hands of the only notary public in the province. The protest was accordingly taken, yet notwithstanding the ship was detained, waiting for the loading till the 22d of August.

The owners of the ship brought an action for demurrage, conform to their charter-party, before the Judge-Admiral, and obtained a decret; which being suspended, it was *pleaded* for the defenders,

That in the greatest part of maritime affairs, where damages, or any other considerable consequence was to arise from the acting or omission of either party, the law had required that instruments should be taken at the time, to the end that witnesses might more particularly remember what past; as was found 14th February 1678, *Calderwood contra Angus**, and in a late case, the

No 10.
Demurrage found due, though the master of a vessel went 60 miles for a notary, there being none nearer, notwithstanding of the usual form of taking protest at the mast.

* *Vide Proofs.*

No 10.

Owners of the Katharine of Whitehaven *contra* the Freighters; so that demurrage could not be due till a protest was used; and, therefore, in anno 1716, Mason *contra* Hamilton, a protest clandestinely taken was not sustained, *voce* FRAUD. The protest taken at Annapolis, above 60 miles from the place where the supercargo was, could be of no effect; for it should have been either taken against the supercargo personally, or at least publicly at the mast of the ship.

It was *answered* for the pursuers, That though often protests were requisite, yet where the lie days were fixed by the charter-party, in that case *dies interpellat pro homine*; and the supercargo, who came along with the ship, could not but know the day of the arrival, and consequently when the lie-days expired; demurrage was therefore due without a protest, especially when, as in this case, it was moderate, and did not exceed the true expense and tear and wear upon the ship; and the protest produced was a sufficient declaration of the master's *animus* in staying, that it was on account of the freighters, and is a presumptive evidence of the ship's being in readiness? as was found in the cases of Whiteside of Whitehaven, anno 1718, and Stenhouse in the year 1722*. As to the decisions cited for the defenders, that of Calderwood's was against them; for, in that case, there were no lie-days fixed by the charter-party; so that the *dies* could not interpell, which made a protest necessary. And in the case of Hamilton and Mason, there was fraud in the skipper; for he being obliged to have his ship ready at a certain day to receive the cargo, took a latent protest without acquainting the master, who was upon the place, and with whom he daily conversed, and yet made no mention of the protest, but allowed him to put his cargo aboard at leisure, and received it without complaint.

' THE LORDS found demurrage due.'

Reporter, Lord Newball. Act. *Ja. Graham.* Alt. *Dun. Forbes.* Clerk, *Dalrymple or Murray.*
Fol. Dic. v. 3. p. 168. Edgar, p. 5.

1760. November 18.

MARJORY STEVEN, Relict of WILLIAM JOHNSTON Maltster in Aberdeen, *against*
JOHN ROBERTSON Merchant there.

No 11.

No action of damages found to lie against the seller of victual for non-implement, where the price was referred to the seller, and the buyer himself having died

IN November 1756, William Johnston maltster in Aberdeen, and Provost Robertson, entered into a verbal agreement; whereby the Provost sold his farm-bear of Pitmillan, for crop 1756, to Johnston, deliverable as soon as the same could be got ready by the tenants, the price to be fixed by the seller.

In pursuance of this agreement, 30 bolls were delivered before Christmas; but Johnston dying soon after, the Provost sold the remainder of his bear to others, at L. 10 Scots per boll, the same price charged for 30 bolls that were delivered; having previously let Johnston's widow know, who made a demand

* See MUTUAL CONTRACT.

for the remainder, that he would deliver her none, as he knew nothing of her circumstances.

Some months after, an action of damages was brought by the widow against Robertson, upon this medium, That he had taken only L. 10 Scots for the bear delivered, and she had been obliged to pay L. 12 soon thereafter for what bear she wanted; and decret was pronounced in her favour.

Pleaded for Robertson, in a suspension of this decree, *1mo*, That in point of interest he could have no temptation to resile, as it was impossible for him to get better terms; and the pursuer could have as little reason for insisting on implement, as she might at that time have purchased any quantity of bear she chose at L. 10 Scots per boll. The defender informed her why he declined the delivery of the remainder of the barley; and she tacitly acquiesced, having never made further requisition. She got that notice immediately upon her husband's death, which was before Christmas. The bear continued from that time till March to be sold currently at L. 10 Scots per boll. She had, therefore, three months to provide herself, at the same price fixed by the defender for the bear formerly delivered; and if, by her own delay, she was obliged to pay a higher price, no claim could from thence arise against the defender; *l. 21. § 3. ff. de act. empt. vend. ; Hotoman. Disp. p. 728.*

2do, There was no stipulation as to the quantity to be delivered; no penalty for failure; the price, the time of delivery, and term of payment, were all left *in arbitrio* of the seller. Had Johnston lived, the seller would have been entitled to have demanded ready money; and, if refused, to have sold his victual to whom he pleased. His answer to the pursuer plainly imported such a demand, or at least a demand for good security; but as she offered neither, and did not even make any further requisition, in common sense he was no longer bound.

3tio, Although an action for damages may be well founded, when a certain price is stipulated, and the seller refuses delivery for the sake of a higher price; yet when the price is referred to the seller himself, there can be no such motive for his failure in delivery. Neither can damage be any consequence of that failure. By the civil law, where the price is referred either to the seller or to the buyer, there can be no claim of damages against the seller for failure to deliver, or against the buyer for refusal to receive; *l. 13. G. De contr. empt.*

Lastly, By the terms of the agreement, the defender was certainly entitled to demand the highest price given for barley that year, which was L. 12. It is inconsistent, therefore, to plead, that his charging only L. 10 for what he had delivered, should be the foundation of an action of damages against him.

Answered for Marjory Steven, The defender's arguments resolve into an objection, *1mo*, To the validity of the contract; *2do*, To the ascertaining damages through breach of it.

With respect to the *first*, it is in vain to have recourse to the civil law to prove its nullity; for whatever may have been the opinion of the civilians, it is

NO I R.
before the whole was delivered, his representatives made a demand for the remainder, but without offering ready money, or caution for the price.

No 11. certain, that such contract is binding by the law of Scotland. In this case, there was a complete bargain for the whole farm-bear, deliverable so soon as it could be got ready. Part of it was delivered; and consequently, as matters were no longer entire, there could be no *locus penitentiae* to the seller, on the death of the buyer. The only thing left to him was, to ascertain the price; and he could not arbitrarily use that power, either to avoid the contract, or commit extortion; if he had attempted either, a court of justice would have given redress.

2do, Neither is the defender's allegiance, That in point of interest he had no temptation to resile, a good defence. The law does not so much consider the benefit arising to the person who resiles, as the damage done to the other party by the breach of a mutual contract. And as to the pursuer's acquiescence in the not delivery, the contrary is manifest; for it is admitted, that she made a demand for delivery, and was refused. Besides, although she had made no requisition, it was incumbent on the defender to have made an offer of the grain, on her paying, or finding sufficient security for the price; but he does not pretend that he made any such offer; and therefore he ought to be liable for any damage she has sustained by the bargain.

Nor is it a good objection, That the pursuer might, some time after her husband's death, have bought bear at L. 10 per boll. She had then a considerable quantity on hand; and it is not pretended, that she could foresee the rise of the price that happened so soon after. Neither do the authorities from the civil law conclude against her, as they do not fix the precise length of time sufficient to bar such an action. And as to what is urged for the defender, That he might have charged the highest price of the season for his barley, and consequently there could be no loss incurred through the not delivery; that argument is fallacious. When a contract is entered into, the terms of which are indefinite, these terms must be settled upon equitable principles. In this case, as the current rate of the country was not known at the time of the bargain, the period for ascertaining the price was very properly deferred to that of delivery. Part of the barley was delivered, and the remainder in readiness for delivery, before the end of December. At that time, it is agreed, the current price was L. 10 Scots, and in equity no more could have been demanded by the defender; and therefore he ought to pay the difference between the price at that time, and what the pursuer was afterwards obliged to pay.

'THE LORDS found no damages due.'

Act. Rar.

Alt. Garden.

I. G.

Fol. Dic. v. 3. p. 168. Fac. Col. No 247. p. 450.

1775. July 27.

ANDREW PITCAIRN junior, Writer in Edinburgh, *against* UMPHRY and ANDERSON, and Others.

No 21.

One who has been imprisoned upon a recognizance entered into for another person has no claim for a *solatium*.

IN the year 1768, the pursuer was employed by the defenders to take care of their interest, in a question about the seizure of a vessel and cargo belonging to them; and a claim being entered on the part of the owners, two bonds of recognizance were necessary, (because there were different causes of seizure tried upon separate informations) which the pursuer entered into, to the extent of L. 60 Sterling for costs. In the first trial, which related to some spirits and tea, a verdict was found in favour of the defendants, and, of course, the recognizance for costs was not vacated. As to the other information, a compromise at length took place, by which the ship and the remainder of the cargo were given up to the makers of the seizure, who, in consideration thereof, paid a certain sum to the owners. These had left the care of settling this compromise to the attornies in Exchequer, whom the pursuer had originally employed to enter the claim, &c. in Exchequer, without his having had any further concern in the matter; but the recognizance he had entered into not having been retired, a writ of *feri facias* was issued against him, which was put in execution both against his person and effects, and he incarcerated in the Canongate prison, till he was liberated upon making payment of L. 52 : 8 : 10 Sterling, the amount of the costs incurred.

Mr Pitcairn then instituted an action against the owners of the vessel, in which he concludes, *1st*, for payment of L. 52 : 8 : 10 Sterling, incurred upon the recognizance for costs; *2dly*, for payment of L. 16 : 16 : 10 Sterling of charges, poundage, prison-fees, &c. with interest of the said sums from the 13th of September 1770; *3dly*, for payment of L. 100 Sterling of damages; and, *lastly*, for expenses of process. And the Lord Ordinary having, by his first interlocutor, found the defenders liable in payment to the pursuer of the two first articles, and, by a subsequent interlocutor, having found the defenders liable in the sum of L. 20 Sterling in name of damages, and as a *solatium*, and a certain sum as the expenses of process, the defenders reclaimed as to the whole articles, and

Pleaded: That, as the pursuer had neglected to acquaint the owners of the vessel, that the bond or recognizance was not vacated, it was most certainly his duty instantly to have paid the money when demanded from him; by which means, all these charges and dues would have been avoided. If a cautioner should allow an adjudication to pass against his estate, that would not found him in any claim against the principal debtor; and, in the same way, the pursuer, in this case, can have no claim against the defenders on account of these charges, so unnecessarily incurred. It may be said, that the situation of the pursuer put it out of his power to pay the sum incurred upon the bond: But, if that was the case, he ought to have been the more attentive, and to have taken

No 21. care to have given previous notice to the owners, that they might have adjusted the affair in due time.

Most of the observations that have been made upon this branch of the libel, will apply with equal force to the claim of damages made by the pursuer; for, if the defenders have been successful in shewing that the pursuer has no right to the charges unnecessarily incurred by him, it must follow, that he can have no claim for damages on account of that imprisonment which, by his imprudence and inattention, he brought upon himself.

The most favourable light in which the pursuer can be viewed, is that of a cautioner. But it never was understood, that a cautioner was entitled to demand damages from the principal debtor, on account of any distress he might have suffered; and, if so, it is not at all obvious upon what principle the pursuer can support his present claim.

It appeared to the Court, upon the whole circumstances of the case, that the pursuer had been badly treated by the defenders. The sole difficulty was as to the *solatium*, which, though allowed to be highly equitable, it was doubted if it could be awarded consistently with principles. And the question having been put, as to this article singly,

THE LORDS 'altered the Lord Ordinary's judgment only as to the L. 20 of *solatium*, but *quoad ultra* adhered thereto.'

Act. *Crosbie*.

Alt. *Abercrombie*.

Clerk, *Ross*.

Fol. Dic. v. 3. p. 168. Fac. Col. No 188. p. 113.

1791. December 13.

CREDITORS OF DAVID CURRIE *against* WILLIAM HANNAY.

No 22.

The highest offerer at a public roup, who failed to find caution according to the articles, by which the purchase devolved to the next, was found liable for the surplus of price.

By the articles of roup of Mr Currie's estate of Newlaw, which was sold judicially, it was stipulated, 'That in case the highest offerer should fail to find caution for payment of the price within thirty days after the roup, the immediately next offerer was to be preferred, &c.; without prejudice to the creditors to insist against the several offerers for the surplus parts of the prices offered by them respectively.'

Mr Hannay was the highest bidder by an excess of L. 290; and it appeared probable, that, by his interference, the price had been greatly enhanced. From some accidental cause, however, he failed to find caution within the time prescribed. He afterwards presented a regular bond, but the right to the purchase was then claimed by the next offerer, on whom, by the articles, it had devolved. This point was afterwards the subject of a litigation, in which Mr Hannay was unsuccessful.

An action having been brought against him for payment of the surplus part of the price offered by him, he, in defence,

Pleaded; The articles of roup, it is plain, conferred no new right. The terms, 'without prejudice,' instead of creating any such, could only reserve what already existed at common law. Now, the common law does not seem to warrant a claim of penalty or damages, like the present, against a party who has committed no fault, and has given occasion to no loss. On the contrary, the defender's appearance as a purchaser has actually produced a large augmentation of price. A special stipulation, therefore, would have been necessary for the support of this action.

Answered; The question here regards not any penalty, but a claim of indemnification, plainly arising *ex contractu*. The highest price offered, which is not to be presumed more than adequate to the value of the lands, was that which the creditors were entitled to receive; and since it has been by the defender's failure withdrawn from them, they have a right to be indemnified of the resulting loss.

THE LORD ORDINARY took the cause to report on informations.

The COURT found Mr Hannay liable for the difference of price.

A reclaiming petition being advised with answers, was refused.

Reporter, *Lord Stonefield*.

Act. *Corbet*.

Alt. *Dean of Faculty, Cathcart*:

Clerk, *Hume*.

Fol. Dic. v. 3. p. 168. Fac. Col. No 195. p. 405.

See REPARATION.—PERICULUM

See LITERARY PROPERTY.—APPENDIX.

APPENDIX.

PART I.

DAMAGE AND INTEREST.

1806. *March 4.* James Morison against Boswell.

No. 1.

By what rule the damage due for non-
implement of
a contract of
sale, is to be
ascertained.

ON 3d October 1799, James Morison, merchant in Leith, purchased from Thomas Boswell, also merchant there, four puncheons of whisky, at the rate of 5s. 4d. *per* gallon. On the same day, intelligence was received, that in consequence of the failure of the crop, distillation was to be stopt; in consequence of which the price of spirits rose immediately, and continued gradually rising for many months afterwards, till the selling price reached 16s. *per* gallon. Boswell, conceiving that Morison had received previous information of the expected event, refused to deliver the whisky; upon which an action was raised against him, to ordain delivery of "four puncheons of good and sufficient aquavita: or "whisky, of proper quantity, strength and quality, at the foresaid rate or "price of 5s. 4d. *per* gallon, or otherwise to make payment to the pursuer of "the sum of £200. Sterling of loss and damage sustained and incurred by "him through the defender's failure to do so."

The defences were repelled both by the Lord Ordinary and the Inner House, 24th February 1801; and the case was remitted to the Lord Ordinary, to estimate the amount of the damage. The following interlocutor (22d Jan. 1803) was pronounced: "Finds that in the morning of the 3d October 1799, "the pursuer James Morison purchased from the defender Thomas Boswell four "puncheons of whisky, at the rate of 5s. 4d. *per* gallon, to be delivered to the "pursuer the same day: Finds, That the defender failed to deliver the spirits "in terms of the said bargain, and that intelligence of the bill brought into Parlia- "ment for stopping the distillation from grain having arrived that very day, "the price of spirits instantly rose, and continued to rise for a considerable time "thereafter: Finds, That notwithstanding repeated demands made for delivery

No. 1. " of the said four puncheons, the defender refused, or delayed to comply ; in
 " consequence of which, the pursuer brought the present action ; the summons
 " in which was executed upon the 1st November 1799, and concluded against
 " the defender for delivery of the said four puncheons at the rate stipulated, or
 " otherwise for the sum of £200. Sterling, as the damages sustained by the de-
 " fender having failed to deliver the same : Finds, That although it was in the
 " defender's power to have fulfilled his bargain, and to have complied with
 " the pursuer's repeated demands for delivery of the spirits, yet he wilfully and
 " culpably refused doing so, till at a very late period of the present litigation,
 " when the price of spirits had fallen a very considerable degree : Finds, That
 " in these circumstances the defender is liable in damages to the pursuer, for
 " his culpable failure in implementing the bargain ; and as from what is stated
 " by both parties, it appears the loss sustained by the pursuer was at least equal
 " to the sum of £200. Sterling, concluded for in the libel on the 1st November
 " 1799, the date of citation to this action, modifies the damages accordingly to
 " that sum, with the interest thereof from the said 1st day of November 1799,
 " and decerns for payment thereof to the pursuer : Finds expenses due from the
 " date of the interlocutor of the Court of the 24th February 1802, and allows
 " an account thereof to be given in."

Against this interlocutor, Boswell reclaimed. The Court (15th June 1804)
 " alter the interlocutors complained of, and find the petitioner liable in dama-
 " ges, according to the highest selling price of whisky per gallon, from the 3d
 " October 1799, the date of the sale, to the 1st of November thereafter, the
 " date of citation to this action."

Morison now reclaimed ; and the Court (25th June 1805) " alter the inter-
 " locutor complained of, and, in terms of the previous interlocutor of the
 " Lord Ordinary, modify the damages to £200. Sterling, and decern for pay-
 " ment thereof to the pursuer, with interest from 1st November 1799 : Find
 " expenses due from the date of the interlocutor of the Court of the 24th
 " of February 1802, and allow an account thereof to be given in."

To which judgment they (4th March 1806) adhered, by the narrowest pos-
 sible majority.

This cause, in its various stages, occasioned great division upon the Bench.
 The defender argued, that, in estimating damage, the price on the day of the
 sale, which was also the date of delivery, must be the rule. The purchaser is
 entitled to have the contract implemented, by obtaining delivery of the article
 sold, for payment of its just price ; but he is not entitled, under the denomi-
 nation of damages, to impose a high fine, nor to convert a claim for *id quod*
obest a patrimonio into a penal action, demanding a sum of money by way of
solutum.

But this answer was held to be satisfactory, that if this was the rule, no bar-
 gain would ever be implemented when there was a rising market, and that the

utmost disregard of good faith in mercantile transactions, would often become profitable.

The pursuer in his turn maintained, that it was a rule of law, founded in justice and expediency, that the seller, refusing to implement his bargain of sale, is liable for damages, to be estimated according to the highest price which could have been got for the commodity, at any time during his contumacy or lawless perseverance in denying justice; that is, any time during the course of the litigation.

The defender, however, contended, that the mode of estimating the damage was not by considering what profit the other party might have made, but by a regard to the conduct of the party who refuses to fulfil the sale,—by examining his motives, to see how far he was to blame. If delivery has by any accident become impossible, he is only bound for the value of the commodity at the time of the bargain; if it has been from a palpable disregard of his own obligation, he must be responsible for the utmost consequences which can result from his dishonourable conduct. Where, again, delivery may have been possible, there may be many cases where the alleged seller may have strong arguments for believing that it was not required of him. If the seller has apparently good reason to believe that he had been imposed upon by the buyer, in such a manner as to warrant him in refusing to deliver the goods, his belief may have been discovered to be erroneous. A court of law will find him obliged to implement; and if this cannot be done by specific delivery, as he had committed no wilful wrong, the value ought to be estimated as on the day of delivery. Before the seller can ever be liable for more, it must be found, not only that he failed to implement, but that the failure must have proceeded from an illegal and fraudulent design.

But to this it was answered satisfactorily, that the estimation of damage for non-implement never can be an arbitrary question, depending upon the criminality of which the seller may have been guilty, which would consequently vibrate backward and forward, according to every shade of difference in the evidence, as estimated by different minds. In a mercantile contract of sale, the purchaser has no concern with the moral turpitude of the other party; and as a private individual, he has no right to demand that punishment shall be inflicted on that account. Contracts must be faithfully implemented, either by specific fulfilment, or by an equivalent in money; this must indemnify him for the loss he has sustained by not having the goods; and the true estimate is therefore the profit which might have been made had the bargain been duly implemented.

The question which next divided the Court was, Whether the damage should be estimated at the highest selling prices between refusal to implement and the date of citation, or during the whole of the litigation which ascertained that the contract must be fulfilled?

No. 1.

With regard to estimating the damage by means of the date of citation, it appeared that this would be a very arbitrary and inadequate rule. The date of citation in an action must depend upon a variety of casual circumstances, totally unconnected with the merits of the case between the parties, or with any fixed principle of law. The citation solemnly calls the defender to fulfil his engagements; and this call never can be held to set him free from fulfilling it.

The majority of the Court thought, that the rule of law was to estimate the damage at the highest profit which could have been made previous to pronouncing decree for implement, according to the rule of the civil law, *L. 1. etc.* and *L. 1. § 3. Act. Empt. et Vend.* and under all the circumstances of the case, that the sum awarded by the Lord Ordinary was the most proper sum to fix as an estimate of the damage. It did not reach the highest selling price during the course of the litigation about implement, but it was the sum concluded for in the summons. One of the Judges expressed it as his opinion, that the correct view of estimating the damage, was to consider the ordinary course of trade, and of the purchaser's dealings, and the time the stock which ought to have been delivered would have probably been sold off. That then his real profit would have been ascertained; for it seemed to be unjust to ascertain the price at a sum which could only have been obtained by retaining the goods unsold an extraordinary length of time. It was giving the high price of speculation without allowing him to incur the slightest risk of loss. But to adopt such a rule, it was thought, would throw great ambiguity into the matter, instead of ascertaining it on any fixed principle.

Lord Ordinary, Cullen.

Act. H. Erskine, Forsyth.

Agent, Jo. Russell.

Alt. Colquhoun, W. Erskine, Cockburn.

Agent, Ro. Ayton, W. S.

F.

Fac. Coll. No. 242. p. 544.

D E A T H.

S E C T. I.

*Morte Mandantis cessat Mandatum; unless the Mandate be
in rem alienam.*

1581. May 6. RAMSAY against Executors of LADY CULL.

JAMES RAMSAY, son and aire to umquhil Mr David Ramsay, pursued for the cancellation of ane perfect contract, made betwixt the said umquhil Mr David, taking the burden upon him for his wife and bairns, on the one part, and umquhil K. Lady Cull, and James Crichton of D. her spouse, for his interest, and thereupon summoned the executor of Lady Cull and Mr David — her spouse, for his interest. Amongst other allegiances made in writ against the cancellation of the said contract, it was *alleged*, that the said contract ought to be cancelled as an imperfect evident, and that tuik na effect; because the twa wives of Mr David — and —, were principal contractors in the said contract, and their husbands but for their interests, and the said wives and Ladies had not subscribed the said contract, nor no verification thereof made in their name. To this was *answered*, That, in so far as the husbands had subscribed the same, it was sufficient for the wives' part without their subscription, *quia maritus est dominus bonorum mobilium de jure Scotiae*. To this was *answered*, That there was renunciation of rights, tacks, and actions, and acceptance of assignation and discharges *hinc inde, et fuerunt jura, actiones, et nomina debitorum*, the whilk principally appertained to the wives, and therefore the consent behoved to be interponed.—THE LORDS repelled allegiance and reply made by Ramsay; and fand, that the subscriptions of the husbands were sufficient, without the subscriptions of the wife. See HUSBAND and WIFE.

In the action and cause foresaid, it was *alleged* be James Ramsay, That the contract should be cancelled and destroyed, because it should have been filled up in ane blank part of the same, whereuntill the sounge of silver was to be put.

No 1.

In the case of a contract, blank in the sum, to be filled up by a third party with what sum he thought fit, the Lords found, that tho' this was not done in his lifetime, yet, if he gave orders for another to do it, that was sufficient, notwithstanding of the rule, *mor: no mandante cessat mandatum.*

No 1. be umquhil the Earl of Murray Regent, and the same not being filled in his lifetime, could not be now filled, *quia mortuo mandatore expirat mandatum*. To this was *answered*, That the contract was made with the advice, consent, and assistance of the said Earl, *prout verba in contractu sonabant*; and the defender offered him to prove, that the said Earl, before his decease, gave command to Mr John Wood, his secretar, to fill up the same blank, with the soume of 300 merks. To this was *answered*, That the allegiance was not relevant, except they wald allege that the said Earl had power to do the same, whilk was not contained and expressed in the blank. — THE LORDS admitted the Earl's command to be proven *per scripturam*. *Ego tamen fui singularis in opinione mea*, that the said blank could not be filled up after the decease of the said Earl, *nullo modo, quia electa fuit industria personæ in predicto Comite; et mortuo mandatore expirabat mandatum; et mandati sunt observandi diligenter in formâ specifica, de qua vide L. C. mandati et ibidem Cartol. et vide etiam glossam in cap. ad agendum in sexto ibidem*.

Fol. Dic. v. i. p. 209. Colvil, MS. p. 298.

No 2.

1628. February 2.

DUFFUS against FORRESTER.

THE executor of the umquhil Laird of Duffus pursued John Forrester for exhibition of a bond of 500 merks made by the defender to Duffus. And being exhibit to hear and see the same registrat; *alleged*, He cannot exhibit the bond, because umquhil Duffus by his letter, directed to the defender, desired the said defender to pay to David Sutherland, carrier of the letter, the said sum, and receive his bond from him; conform whereunto he paid the sum to David, and retired his own bond and cancelled it. *Replied*, Not relevant, unless it were alleged that he paid conform to the letter before Duffus's decease. Which reply the LORDS sustained, *quia mortuo mandatore expiravit mandatum*.

Fol. Dic. v. i. p. 209. Spottiswood, (EXHIBITION) p. 123.

No 3.

The rule, that *mortuo mandante cessat mandatum*, was found not to take place in a procuratory in *rem suam*, where the procurator, who, by virtue of his procuratory,

1629. June 30.

SHAW against L. DUNIPACE.

A PROCURATORY made by the consituent, to his procurator, to pursue for some debts owing to the constituent, was sustained as a good title to pursue the debtors thereupon, for payment to the procurator, and the action was sustained at the procurator's instance, after the decease of the constituent; and the allegiance proponed against the action and procuratory, viz. *quod mortuo mandatore expirat mandatum*, was repelled; in respect, by the procuratory, the constituent made him procurator *in rem suam*, because of payment made to him by the pro-

curator of the said sums, for which he had the procuratory, whereby to pursue, and so it was not revocable, even though he had been living.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 209. Durie, p. 452.

No 3.
was pursuing
debts, had al-
ready paid
the sum to
the consti-
tuent.

SECT. II.

Procuratories and Precepts.

1611. February 6. GILBERT ROBERTSON *against* The BAILIE of BURNTISLAND.

GILBERT ROBERTSON having obtained a procuratory of resignation of a tenement of land, in Burntisland, from a woman who was heritable proprietor thereof, and having required the Bailie of the town to receive the resignation, and give him infeftment conform thereto; and taking instrument upon the Bailie's refusal, the woman who made the resignation thereafter deceasing, Gilbert pursued the Bailie, and the woman's heir, for his interest, to hear the Bailie decerned to give him sasine upon the foresaid resignation, and to hear the same found as lawful as if the sasine had been given in the resigner's lifetime, which reason the LORDS found relevant, and decerned conform thereto.

Fol. Dic. v. 1. p. 209. Haddington, MS. No 2144.

No 4.
A sasine was
decerned to
be given by
the superior
upon a procu-
ratory of re-
signation af-
ter the re-
signer's death,
upon instru-
ment taken
against the
superior for
refusing be-
fore the re-
signer died.

1707. March 28. LADY MARY BRUCE *against* The EARL of KINCARDINE.

THE said Lady Mary, eldest sister to the last Earl of Kincardine, and William Cochran of Ochiltree, her husband, pursue Sir Alexander Bruce of Broomhall, now Earl of Kincardine, on this ground, that the last Earl subscribed two procuratories of resignation in favour of the said Lady Mary, for resigning the title, dignity and honour in the Queen's hands in her favours; and therefore, the said Sir Alexander, as heir-male, had no right to assume the title of Earl of Kincardine, his predecessor being denuded; and therefore, should be prohibit and discharged from using the same; and that Lady Mary had right to obtain from the Queen a patent on her brother's procuratories, notwithstanding the same were never resigned before his death, if the Queen please to confer the same. *Alleged* for the Earl, That titles of honour not being *in commercio*, they

No 5.
A procurato-
ry of resigna-
tion of a title
of honour,
found not to
fall under the
act 1693, so
as to become
void by the
death of the
granter.

No 5.

can never be assigned, disposed, conveyed, nor transmitted, except in the lineal succession of blood. *2do*, Whatever may be said of procuratories, where resignation has been actually made in the granter's lifetime, and accepted by the Sovereign, who is the fountain of honour, yet no such thing can be pleaded here, seeing these procuratories were only an inchoate incomplete deed, and never perfected in the last Earl, the granter's lifetime, and so fell and perished with him, seeing *morte mandatoris expirat mandatum*; neither can it be supported by the act of Parliament 1693, allowing procuratories to be expedite after the granter's death, seeing it is plain, that act only concerns the property of lands, and not titles of honour; so they still, under the old rule of law, extinguish and die with the granter, if not perfected before his death, according to the brocard, *Nil censetur actum quandiu quid restat agendum*. *3tio*, He resigns only as heir-male to Earl Edward, passing by Earl Alexander, his father, who was last in *tenemento* and in possession of the title, which he could not do, and so *quod voluit non potuit, et quod potuit nec voluit nec fecit*, but resigns a non-entity, seeing he could not pass by his father, and ascend to Earl Edward his uncle. *4to*, The defender's *jus quæsitum* cannot be taken from him, being admitted to sit and vote by authority of Parliament; and, though it reserves Lady Mary's declarator, yet that pre-supposes a right in her person, which can never be pretended, seeing a procuratory *in favorem* confers no positive right till it be accepted, and is no more but a purpose and resolution alterable at pleasure, and an embryo till the prince ripen it by acceptance, till which time resignation of honours is wholly pendulous; and if the Queen shut the sluice and refuse it, then the patent's current runs in its natural channel to Broomhall, the heir-male, and the retrograde motion designed is broke off; and such procuratories signify no more without the Sovereign's consent, than a minor's obligation without his curators, and an interdicted person without his interdictors, or a beneficed person setting tacks without consent of his patron and chapter, or a decreet-arbitral pronounced after the submitter's death; and the predecessor's deed cannot prejudice his successor in the dignity; as Sir George Mackenzie, in his precedency, page 82. &c. thinks from Antonius Faber, and other eminent lawyers, that a nobleman, by learning a mechanic, or other mean employment, does not derogate from, nor lose the dignity to his successor. See *Tiraquel. de nobilitate*; and in the book called Parliamentary Cases, it was found in the action of the Viscount of Purbeck in England, that the assuming the peerage absorbs all other inferior degrees of nobility; neither can the last Earl of Kincardine be said to be divested, till another be invested in the dignity, which is not here pretended, but only an imaginary capability; for a right cannot be lost to one till it be acquired by another, as Dirleton, Craig, and all our lawyers agree. And seeing all confess that Lady Mary can have no right to this honour, till the Queen please to give it, then at present the right which cannot hang in the air, must remain with Broomhall, the heir-male; and the tincture of blood cannot be taken from him, nor his privilege of a born coun-

seller ; the bench of the nobility having an interest not to be deprived of one of their number. *Answered* for Lady Mary Bruce, That it is true, titles of honour are not transmissible by assignation, nor are they the subject of commerce ; yet it is of undeniable notoriety, that they go with us by resignation, if the prince consent, as many titles in Scotland are now possessed ; and within this month, on the Lord Gray's resignation in favour of Gray of Crichton, he was admitted on the Queen's patent to sit with the precedence of Lord Gray in Parliament. It is acknowledged, in the old Roman Government, dignities were not hereditary, but annexed to offices, and called *comites sacri palatii* ; but the feudal law altered this quite, and annexed it to lands and fees, but so as they were still capable of extinction by dismissal, resignation in the sovereign's hands, or refutation ; and so it was found in that famous case, 11th July 1633, Douglas and the Lord Oliphant, *voce PEER*, where King Charles I. himself was present, and a procuratory was sustained to denude the granter of his title ; and here, the last Earl of Kincardine reserved no power to alter, but gave it with a clause *de rato*, obliging him to hold firm and stable ; so this divesting him, his heir-male can have no claim, and his possession in Parliament was qualified and limited, till the declarator were discussed, and so was only temporary till the point of right was tried. And his mentioning Earl Edward in the procuratory, was only because he was the first original with whom the honour began, and from whom it descended to him. THE LORDS, by plurality, found the procuratories did not become void and null by the death of Earl Alexander, the granter, but that they may be yet perfected in favour of Lady Mary, and her heirs, if the Queen please to accept of the same, and confer the title on her. Then Broomhall *contended*, That no regard could be had to the procuratories, because the said last Earl, the time he was signing them, was notourly fatuous, furious and mad ; and condescended on several passages of blasphemy and folly to a high degree. And further *alleged*, That he was circumvented, imposed upon, and cheated, in so far as he being blind, one paper was presented to him for another, and it was never read to him ; and that he frequently protested he would never wrong Broomhall, his cousin. *Answered* for Lady Mary, Whatever infirmities he laboured under, yet at the time of these procuratories he was sober, and sat and voted in Parliament, being in July 1703. THE LORDS, before answer, allowed a conjunct probation of his condition at and about that time, both of the deeds of fatuity, and his sober and rational deportment. The Lady Ochiltree's main design, was, if she could not get the title and dignity to herself and her son, that at least it might be sunk and extinct, and Broomhall prohibited to use it before the union should commence in May next ; but the allegiance of fatuity was so pregnantly circumstantiate, such as his fancies, that he could fly in the air, and ought to marry his sister, and his fasting forty days with Peter Poiret the Burignionist, &c. that it was impossible for any judiciary in the Christian world to repel them.

No 5.

On the 29th March 1707, Lord Kincardine gave in a protestation for remeid of law against the foresaid interlocutor to the Queen and Parliament, and after the union to their next competent judicatory for determining such appeals. But the LORDS finding some indecent expressions, and matters of fact wrong narrated, they refused to admit it; whereupon he presented another rectified in these particulars, which the LORDS allowed the clerk to take in, but not to insert in the decret, seeing the article in the claim of right speaks of sentences, but not of interlocutors; though our Parliament, in Sir Thomas Dalziel of Bin's case, against the Heiress of Caldwell, admitted an appeal from an interlocutor.

THE LORDS would not determine whether appeals now to the Parliament of Great Britain are legal or not; for our article could have no such meaning nor prospect; and the House of Commons have long debated if the Peers have such a jurisdiction and power, but left it wholly undecided and entire. And some thought Broomhall might continue his possession of the title as Earl of Kincardine, ay till the Queen accepted of the resignation on the last Earl's procuratory, and that he could not be fully divested till then.

Fol. Dic. v. 1. p. 209. Fountainhall, v. 2. p. 367.

No 6.

Found that precepts of sasine became void by the death of the granter, whether issued from the chancery, or by subjects superior.

1716. July 4. JOHNSTON of Corehead, *against* JOHNSTON of Newton.

In a process of reduction and improbation, and also a declarator of non-entry, at the instance of Corehead against Newton his vassal, the title produced by the pursuer being a charter under the Great Seal in anno 1648, with a precept out of the Chancery that same year, but without any infeftment till the year 1714, that Corehead is served heir to his grand-father, the obtainer of the charter; and, upon this general service, as giving right to the precept of sasine, having infeft himself upon the act of Parliament 1693, giving force to precepts of sasine after the granter and receiver's death.

Compearance was made for Newton's creditors, who *objected* against the pursuer's title: That the act 1693 concerns only procuratories of resignation and precepts of sasine granted by subjects among themselves; and that, both from the words and intent of the act, and that the words being (considering that procuratories of resignation and precepts of sasine became void by the death of granters, as well as by the death of those in whose favours they were granted) granters here, is not applicable in stile to precepts issued forth of the Chancery, and then it was not the intent of this act to derogate from the rules in Exchequer.

Answered for the pursuer: That the act 1693 makes no distinction betwixt precepts of sasine by subjects, and those by the sovereign; but statutes in general, without any exception, unless of precepts of *clare constat*; and, since the law has not distinguished, no person is warranted to make a difference,

2do, The reason of the law is full stronger in precepts out of the Ghancery than in the other case, the reason expressed being for preventing unnecessary charges in renewing of precepts: Now, this holds strongest in the case of precepts by the Crown, since it is very unreasonable, that, where a party has paid a full composition for obtaining a charter, and precept upon resignation, if he die before the precept be executed, his son or grand-son should be obliged to pay a new composition to obtain a new charter.

'THE LORDS found, That sasines given to an heir or assignee, on a precept under the Great Seal, are warranted by the 35th act of the Parliament 1693; and therefore repelled the objection.'

Act. Sir James Nasmyth & Robert Dundas. Alt. Sir Walter Pringle. Clerk, M'Kenzie.

Fol. Dic. v. 1. p. 209. Bruce, No 11. p. 14.

SECT. III.

Death pendente processu;—in cursu diligentia.

1626. December 20. YOUNG L. LEY against BLAIR'S RELICT.

IN a declarator of the escheat of umquhile William Blair, rebel, at the instance of the young Laird of Ley, donatar thereto, against his relict, and brothers and sisters;—compeared in this process one of the rebel's creditors, and *alleged* that the horning, whereupon declarator was sought, was null, because the rebel was deceased before the registration of the said horning. This allegiance was repelled, and the horning sustained, albeit not registrate till after the rebel's decease, seeing he being lawfully denounced in his lifetime, the party might lawfully registrate the same *quocunque tempore*, as well after the rebel's decease, as before, being done *debite tempore*, within the time required thereto; for his intervening death could not be found a lawful impediment to hinder the user of the horning, to adhibit that solemnity which was required thereto of the law.

No 7.

A horning, whereon denunciation followed during the rebel's life, might have been registered after his death, and escheat might have fallen upon it.

Act. Mowat.

Alt. —.

Clerk, Hay.

Fol. Dic. v. 1. p. 210. Durie, p. 250.

No 8.

Certification being granted, but extract superseded till a day, and the defender dying *medio tempore*, the Lords refused to grant certification.

1629. February 17. E. of MARR *against* His VASSALS.

In improbations, the LORDS will grant certification against a defender, and let incident run for another. *Item* if certification be granted, but the extracting superseded till a day, if *medio tempore* the defender die, the LORDS will not grant certification.

Fol. Dic. v. 1. p. 210. Kerse, MS. ff. 208.

No 9.

1686. January. WILLIAM BURGH *against* SIR WILLIAM SHARP.

A DECRET being stopt upon a bill given in by the defender, which was ordained to be seen and answered, and the defender having died before advising of bill and answers, the LORDS proceeded to advise then, and finding nothing alleged relevant to make any alteration of the terms of the decret, ordained the same to be extracted without transferring *passive*.

Fol. Dic. v. 1. p. 210. Harcarse, (DECREETS.) No 408. p. 109.

S E C T. IV.

Where a Master or Tenant Die after Warning.

No 10.

A warning against a father who thereafter died, sustained as a ground of removing against the son, who was called in the removing, without necessity of using a new warning against the son.

1567. February 20. CRANSTON *against* BROWN.

ANENT the action pursued be Richard Cranston, fiar of the lands of Marveston, against James Brown, son and appearand heir of George Brown of Coalston, and other possessors of the said lands, it was *alleged* be the said pursuer, that the said defenders should remove frae the said lands, as they were lawfully warned therefrae, conform to the act of Parliament. It was *alleged* be the said possessors, That they sould not remove, notwithstanding the said warning, because the said James Brown was principal tenant to the said setter of the feu to the said pursuer, and they but sub-tenants to the said James, who deceased before the calling of the said matter, and sua the said sub-tenants should not be decerned to remove frae the said lands, while the said James's aires were called. It was *answered* be the pursuer, That the allegiance of the defender was not relevant, except they wald allege, that the said James had tacks or some other right of the said lands for terms to rin, and in possession thereof, be paying of mails and duties to the setter thereof to the said pursuer, before the setting of

the same in feu, immediately before the said warning; and because the said defender would not qualify that exception, as is above written, therefore the LORDS repelled the same, and thought it was not necessary to summon the said James, and for the cause foresaid.

Fol. Dic. v. 1. p. 210. Maitland, MS. p. 183.*

1629. November 27. JOHN RAMSAY *against* HUME.

IN a removing pursued by John Ramsay, upon a warning made by the pursuer and Lo. Ramsay, who was liferenter of the lands, whereof this pursuer was then fiar; it was *alleged*, That no process could be upon the said warning, because it was made by the liferenter, the time of his liferent standing, the heiritor now pursuing having no right then to warn; and now the liferenter being dead, to whom the interest to prosecute that warning belonged, this pursuer therefore cannot seek removing thereon. This allegiance was repelled, seeing the liferenter and fiar concurring in the making of the warning, the survivor might pursue removing thereon.

Act. Lawrie.

Alt. Sandilands.

Fol. Dic. v. 1. p. 210. Durie, p. 470.

1630. January 27. HUME *against* HUME.

IN a removing, the father who was warned, being dead before that summons was raised upon that warning, and his son being summoned to remove by the summons which was raised upon that warning against the rest of the possessors, who were warned also with his father; the LORDS found no necessity to warn the son of new again to remove at another Whitsunday; but sustained process against him, upon the warning made to his umquhile father, his son being cited in this summons with the rest of the defenders, who were warned when his father was warned, albeit the son was not warned.

Fol. Dic. v. 1. p. 210. Durie, p. 486.

1637. July 28. E. of HADDINGTON *against* His TENANTS.

THE E. of Haddington pursuing removing against his tenants, as heir retoured to his father, and infest so as heir to him upon a warning, made at his father's instance, before Whitsunday last, and after which warning, and some few days after the term foresaid, the umquhile Earl, maker of this warning died; and it being *alleged*, That no process could be sustained at the pursuer's in-

* This case is called by mistake in the *Fol. Dic.* Home *against* Kennedy.

No 10.

No 11.

An heir, after he is retoured and infest, may pursue a removing upon a warning given by his predecessor, though his predecessor survived the term.

No 12.

Found in conformity with No 10. *supra*.

No 13.

Found in conformity with Ramsay *against* Hume, *supra*.

No 13.

stance upon that warning, only executed at his unquihile father's instance, which became extinct by his decease ; and this pursuer could not be heard to do any legal deed thereupon by removing, unto the time a new warning was executed lawfully at his own instance : And also *alleged*, That the pursuer's retour and sasine were both after the term, before which the warning was made ; so that albeit the warning had been at his own instance, yet the same cannot be sustained, he neither being then, nor yet at the term, nor before it, either retoured heir or seased, far less can it be sustained to maintain the warning at his instance, which was executed by the defunct.—THE LORDS repelled both these allegiances, and found, That the heir might prosecute the warning, and intent action thereupon, which was used by his deceased predecessor, albeit nothing had been further prosecute thereupon by the defunct before his decease, and which the LORDS found the heir might competently do, as well where the defunct dies before the term to which the warning was made, as when he dies after the term ; neither was it respected, that the gross profits of the first year after the warning, might be claimed by the executors of the defunct who survived the term, and that the heir could not have right thereto : And also, the LORDS repelled the other allegiance ; for they found that the retour and sasine, albeit both after the term, gave the pursuer sufficient title and interest to pursue this removing, against a party who had no right to the land himself, and that the retour and sasine should be drawn back ; but I find a scruple in this decision, and for the back-drawing of the retour and sasine, I conceive not how they can be drawn back to give the pursuer right to a personal act as warning, which then he could not make or do, the defunct who then had the only right being living for the time.

Act. *Advocatus et Stuart.*[Alt. *Craig et Gilmore.* Clerk, *Sees.**Fol. Dic. v. 1. p. 210. Durie, p. 855.*

SECT. V.

Judicial Deeds, after the Judges death or removal.

1627. March 9.

STUART *against* FLEMING.

No 14.

IN an action betwixt Stuart and Fleming, the LORDS found, That after the decease of the judge and clerk, the intrant and succeeding clerk might extract an act out of the books of that jurisdiction, which was registrate therein of before, and that there needed no transumpt or warrant to add force thereto, as in

prothecals, where the clerk of burghs or notaries are dead. This was in the town books of Glasgow.

No 14.

Act. Cunningham.

Alt. Fraser.

Fol. Dic. v. 1. p. 210. Durie, p. 287.

1629. January 22. MASTERTON against ROBERTSON.

No 15.

AN exception of poinding was sustained to elide an action of spuilzie, albeit the goods were intromitted with by the defender at his own hand, by the space of three hours before the officer who poinded, or entered to an act of poinding; and also, albeit the Sheriff who directed the precept of poinding was not in office, nor Sheriff at the time when the precept was execute, but that the time of the poinding there was another Sheriff; which was not respected, but was found that a precept direct by a Sheriff before, albeit not execute so long as he was in office, yet might be execute thereafter in the time of the next succeeding Sheriff, without any new precept to be directed by him, for that would put the subjects to unnecessary charges; and there was two years almost betwixt the date of the precept and the time of the execution; yet the same was nevertheless sustained.

An exception of lawful poinding was sustained to elide an action of spuilzie, although the Sheriff who directed the precept of poinding was now two years out of office, and another in his place. The Lords found no necessity to put the lieges to the charges of a new precept, in such a case.

Act. ———.

Alt. Nairn.

Clerk, Gibson.

Fol. Dic. v. 1. p. 210. Durie, p. 416.

* * Spottiswood reports the same case, calling the parties Robertson against Myrton :

ALEXAMDER ROBERTSON convened Alexander Myrton for spoliation of 27 wedders.—*Alleged*, No spuilzie, because he only assisted the officer in poinding of the wedders by virtue of a sentence.—*Replied*, The poinding was not lawful, because the precept was direct by the Laird of Bonniton, being then Sheriff; and it was not execute till he was out of his office, which could not be.—*Duplied*, No necessity to raise new precepts in the new Sheriff's name, where they are changed yearly. It is true that the prince, *qui est fons jurisdictionis*, being altered, *cessat jurisdictio*; but to say when a Sheriff cedeth his place to another, that his precept expieth, the King living, is absurd. Many of the LORDS found the exception only relevant to elide the spuilzie, but not for wrongous intromission and restitution of the goods, in respect of the reply; yet the most part sustained the exception even against wrongous intromission.

Spottiswood, (SHERIFF.) p. 311.

1732. February 18. HUNTER *against* MONTGOMERY.

No 16.

A NULLITY objected to a poinding was repelled, viz. That the bill and protest were registered, when the Bailie principal of the bailiary was dead, and the commission to the bailie depute or substitute had fallen by the death of the bailie principal. See No 7. p. 3097. See APPENDIX.

Fol. Dic. v. 1. p. 210.

SECT. VI.

Order of Redemption.

1638. December 11. FINLAYSON *against* WEMYSS.

No 17.

AN order of redemption used against the father, was found sufficient after his death, as a foundation of a declarator of redemption against the apparent heir, without necessity of a new order.

Fol. Dic. v. 1. p. 210.

See This case *voce* CHARGE TO ENTER HEIR, No 5. p. 2170.

Apprising and arrestment fall not by the common debtor's death; see ADJUDICATION.—ARRESTMENT.

Confirmation may be after the disponent's death; see CONFIRMATION.

See APPENDIX.

DEATH - B E D.

SECT. I.

Reduction *capite lecti*, to whom Competent.

1663. February 25.

HEPBURN against HEPBURN.

THE estate of Humby being provided to heirs whatsoever, umquhile Thomas Hepburn of Humby, in his contract of marriage with Elizabeth Johnston, provides the said estate to the heirs-male, and provides 25,000 merks for the daughters; there is a clause of the contract, bearing, that it should be leisome to the said Thomas, at any time during his life, to alter the said provision, or to dispoise thereof according to his pleasure; thereafter, upon death-bed, he disposed the whole estate in favours of his daughter of the marriage, being his only child. Adam Hepburn his brother, as heir-male, intents reduction of that disposition, as being done in *lecto ægritudinis*. It was *alleged* for the defender, *primo, minor non tenetur placitare de hæreditate paterna*. The defender is minor, and now the question of reduction is upon her father's heritage. It was *answered*, that the maxim holds not, where the question is of the disposition made to the minor, whether valid or not, but where the question is not upon the minor's right, but upon the father's right; which right of the father's, or predecessor's, the minor is not holden to dispute.

THE LORDS repelled this defence in respect of the reply.' *2dly*, It was *alleged* absolutor, because the pursuer having only a personal provision in his favours, conceived in the contract of marriage, and there being, as yet, no infestment to heirs-male, the maxim that no deed upon death-bed can be prejudicial to heirs, can be extended to none but such as are special heirs, and not to those who are by destination heirs, which is less than if a charter had been granted to the heir-male, which, according to Craig's opinion, is but as *nudum pactum*, and an incomplete right, and could not compel the heirs of line to re-

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No I.

The law of death-bed protects every sort of heir, male or of tailzie, as well as heirs of line; those who are heirs in personal rights, as well as those who succeed to infestments.

No 1.

sign. The pursuer *answered*, that the maxim is general, and there is no distinction by law or custom, whatsoever the heirs be; so that a person having a right to heritable bonds, bearing clause of infeftment, whereupon no infeftment had followed, could do nothing upon death-bed in prejudice of the heirs, who would have succeeded unto those bonds; as to Craig's opinion of a charter, it is against law, and the common opinion now received, that a charter, or any provision in writ, is effectual against the granter and his heirs, to compel them to complete the same.

'THE LORDS repelled this defence.' 3dly, It was *alleged* absolutor, because the maxim can be only understood of the heir of line, as nearest of blood, so that nothing can be effectually done in their prejudice; but here the disposition is but in prejudice of an heir-male, and in favours of an heir of line, in respect of whom the heir male is but a stranger; which is the more clear, because this maxim being very ancient, was produced before there was any heir male or of tailzie; and because the reason of the law is founded upon the natural obligation parents and predecessors have of providing their successors, and so can do them no prejudice, especially when they are weak and on death-bed. The pursuer *answered*, as before, that the maxim is general, and there is no distinction introduced by law or custom of heirs-male; and albeit the law had introduced such heirs since this common law, yet in so far as it makes them heirs, it gives them the privilege of heirs, to which the reason of the law doth well quadrate, which is not that natural obligation, but this presumption of law, that persons on death-bed are facile, and weaker in their capacities than at other times, and therefore the law disables them at that time to alter the settlement of their estates, as they were in their health, and so allows of no deed in prejudice of any heir of whatsoever kind, although in favours of another.

'THE LORDS repelled this defence.' 4thly, It was *alleged*, that the defunct, having himself constitute this interest of the heir-male, had reserved this power to himself, to alter it during his life, can signify nothing, unless it empower him to do it on death-bed, because, without any such reversion, he might have altered the tailzie, during his *hege poustie*. The pursuer *answered*, *Pactum privatorum non derogat jure communi*; therefore this being a special part of our common law, anterior to either act of Parliament, or practique, no private provision or reversion can capacitate any person to do that which the law declares void; especially being upon a reason of weakness and infirmity, which is presumed in persons on death-bed; *præsumptione juris et de jure*, admitting no contrary probation, for it will not be admitted, to prove that the disponent was in perfect soundness of mind, and therefore, if any person should reserve a power to dispoise, though he were not *compos mentis*, the reservation would signify nothing, so here neither is the ordinary word adjected, *etiam in articulo mortis*, or on death-bed, and so cannot be extended to that case, and can reach only to what is done lawfully, *legitimo tempore et modo*; and there is far less inconvenience that a cause should be superfluous, which is very ordinary, than that it should

extend to take away common law; neither is the provision adjected as an express condition upon which the tailzie was made, and no otherwise.

No 1.

'THE LORDS repelled also this defence, in respect of the reply, and so having advised all the defences and disputes in the afternoon, albeit the parties had agreed before hand, and the heir of line's portion doubled; yet the LORDS were generally clear in the decisions above written, as relevant in themselves.'

Fol. Dic. v. 1. p. 211. Stair, v. 1. p. 186.

1672. July 24.

PORTERFIELD against CANT.

No 2.

The law of death-bed takes place in favour of all sorts of heirs, whether the destination be by infestment or only in a personal deed.

ELIZABETH CANT having taken certain bonds to herself, and failing of her by decease, to the children of John Porterfield her son; and Mr Walter Cant having been tutor to Margaret Porterfield, only bairn of the said John Porterfield, the said Margaret pursues Catharine Cant as executrix to the said Mr Walter, to deliver the bonds, or the sums therein contained. The defender *alleged* absolvitor, because the pursuer being only substitute in the bond to Elizabeth Cant her good-dame, the said Elizabeth who was fiar, and might dispone, did assign the saids bonds to Sir Patrick Drummond, for the behoof of John Porterfield her son, father to this pursuer, whose debts the tutor paid, which ought to be allowed in the sums contained in these bonds. It was *answered*, That that assignation was *in lecto aggritudinis*, whereupon the pursuer hath intended reduction, and repeats the same by way of reply. It was *replied*, That *posito* the assignation had been on death-bed, it is not reducible on that head; because there is a provision in the bonds, that it should be leisome to the grandmother to assign and dispone the sums at her pleasure, without consent of the substitutes; and so having disposed in favours of her own son the pursuer's father, who was her heir of line, and this pursuer as substitute, being but heir of provision; she might lawfully do the same. It was *duplicated*, That the privilege of heirs is not to be prejudged by their predecessors' deeds on death-bed, which doth extend generally to all heirs, so that a deed done in prejudice of an heir-male or of tailzie, in favours of an heir of line, though nearer of blood, is reducible; because the ground of the law is, that parties after contracting of the sickness whereof they died, become weak, and therefore are not allowed to alter the succession of their heritage, as it was established before they became sick; and the provision of the bonds reserving a power to dispone, can only be understood to be *legitimo modo*, in the way allowed by law, and cannot warrant a deed done on death-bed.

Which the LORDS found relevant, and sustained the reduction by way of reply.

Fol. Dic. v. 1. p. 211. Stair, v. 2. p. 109.

1726. *January 26.*

No 3.

MARQUIS CLYDESDALE *against* The EARL of DUNDONALD.

THE law of death-bed takes place in favour of all sorts of heirs, whether the destination be by infeftment or only in a personal deed.

Fol. Dic. v. I. p. 211.

*** See This case ~~vide BARR. INFEFTMENT~~, No 3. p. 1266.

No 4.

A substitute cannot reduce in a case where the institute could not.

1738. *November.*IRVING *against* IRVING and her Husband.

A DISPOSITION having been granted in *liege poustie* to a younger son, with a power to alter, thereafter a new deed was granted in favour of the son of the said younger son, with a substitution to the eldest son; and, after all, a third deed on death-bed to the said son of the younger son, his heirs and assignees.

Of this last deed, a reduction on the head of death-bed being pursued by the eldest son, not only as heir at law, but as heir substitute, and of which right of substitution he could not be deprived on death-bed; it was found, 'He had no right to reduce either as heir of line, because of the first disposition in *liege poustie*, or as heir substitute; because, however a substitute has been found entitled to reduce, that was only where the deed was prejudicial to the institute. But, in this case, the institute was not prejudiced but benefited; and in no case can the substitute reduce where the institute could not.

Kilkerran, (DEATH-BED) No 1. p. 151.

1740. *November 18.*WILLIAM HEDDERWICK *against* JAMES CAMPBELL.

No 5.

Reduction of a death-bed deed was found incompetent, in a case where the institutes in the disposition challenged, who were the nearest heirs at the time had obtained possession, and the action was at the instance of a remoter heir.

WILLIAM PRINGLE, upon deathbed, made over certain heritable subjects to Mary and Marion Pringles, his two daughters, and only children, and failing of these, in favours of James and Adam Parkers his nephews; Marion, the youngest daughter, died an infant, and Mary, the eldest, married the said James Campbell, to whom she conveyed the whole subjects, (by a postnuptial contract), disposed by her father, and thereafter died, in minority, without issue. William Hedderwick being likewise a nephew to William Pringle, by his eldest sister, and being by his uncle's death-bed deed cut out from a share of the succession to him, upon the failure of his two daughters, brought an action of reduction of that deed against James and Adam Parkers, as done on death-bed, to his hurt and prejudice; and against the said James Campbell upon the head of minority and lesion. In support whereof, it was *pleaded*, That the law of death-

bed takes place in favours of remoter heirs, as well as those that are immediate heirs to the granter, unless such deed has been ratified by a person having a title to quarrel it; and that, in the present case, there is no such ratification of the deed in question as ought to exclude this action; see chap. 18. § 7. Book 2. of the Reg. Maj. chap. 13. stat. Will. Craig, L. 1. Dieg. 13. § 36. Margaret Gray, No 16. p. 3196. ; Sir John Kennedy, No 22. p. 1681. It remains then to be considered, if Mary and Marion Pringles, the daughters of William, so far acquiesced in and homologated the deed in question as to exclude the pursuer. As to which, Marion died an infant, and so could not do any deed importing an acceptance thereof; and as for Mary, the other daughter, she never made up any title as heir to her sister, to her interest in the subjects contained in her father's disposition, and which remain *in hæreditate* of Marion at this day; and the acceptance of the deed quarrelled by Mary the eldest daughter, appearing only by a postnuptial contract of marriage, cannot exclude the pursuer from this action, in regard she died in minority; during which time, as she could not by any deed of hers settle any order of successors in heritable subjects, neither could she so far ratify her father's deed, as to exclude any person who had a legal title to quarrel the same; nay, she could have revoked that acceptance, and insisted in a reduction of the deed in question, since she was leased thereby, in so far as substitutes were named by her father to her, to the exclusion of her nearest heirs; much more has the pursuer, who is chiefly hurt, a right to insist in the present action, now that the succession is opened to him.

Answered for James Campbell; That supposing there had been no deed of the nearest heir, either exprest or implied, homologating and accepting of William Pringle's death-bed deed, yet that no action of reduction was competent to a remote heir, when the nearest and immediate heir was institute; but as this is not the present case, it was needless to insist upon it. Further, it was said, that if either Mary or Marion Pringles accepted of the disposition from their father, such acceptance excluded all other remote heirs, such as the pursuer, from challenging the same upon the head of death-bed. *2do*, That Marion Pringle's share of her father's estate was fully vested in Mary, by her survivance, without necessity of a service, in terms of the deed quarrelled. *3tio*, That it was *jus tertii* to the pursuer to make this objection. And, *lastly*, That Mary could not revoke the acceptance, as the terms of the contract of marriage were reasonable, and that it is certain minors may enter into marriage-contracts; and that it could not be maintained she was leased by accepting her father's disposition, and possessing the subjects disposed; which excluded the pursuer from quarrelling the disposition on the head of death-bed, and consequently, from quarrelling the marriage-settlement she afterwards made with James Campbell. See 4th July 1632, Davidson against Hamilton, *voce* MINOR; 22d November 1664, McGill against Ruthven, *voce* HOMOLOGATION.

THE LORDS found, that the institutes in the disposition quarrelled, who were nearest heirs at the time, having attained possession, the same is not reducible

No 5. at the instance of the pursuer, a remoter heir; and therefore found him not entitled to insist in this action of reduction.

Fol. Dic. v. 3. p. 169. C. Home, No 148. p. 268.

No 6. 1741. February. CHRISTIAN BEGG against JAMES ARNOT.

DEBATED, but not determined, whether a donatar of *ultimus hæres* has the same privilege with a natural heir to reduce a deed done on death-bed?

Rem. Dec. v. 2. No 18. p. 32.

1744. November 2. CLEUCH against LESLIE.

No 7.

It is only the person who is heir to the granter of the deed by which he is excluded, to whom the objection of death-bed is competent.

JAMES LESLIE disposed his estate on death-bed to Archibald his eldest son, and the heirs of his body; whom failing, to the children of John his second son, with the burden of an yearly liferent to Violet Johnston his eldest son's wife.

Archibald, the eldest son, about a year after his father's death, died without issue; and, on death-bed, ratified his father's disposition, by executing a new disposition in the precise terms of it.

In the action of reduction of both dispositions, by John, the second son, on the head of death-bed, it was found not competent to him to quarrel Archibald's ratification on the head of death-bed, for this reason, that none can object death-bed but he who is heir to the granter in the subject from which he is by that deed excluded; but, as Archibald died in the state of apparency, *quoad* the subject in question, and that, by the disposition to him from his father, the pursuer was excluded, and he could in no shape qualify his being heir to Archibald, he could not therefore quarrel any deed of Archibald's.

Fol. Dic. v. 3. p. 169. Kilkerran, (DEATH-BED) No 3. p. 152.

* * * Lord Kames reports the same case :

A ratification is not a deed that can be reduced as on death-bed.

JAMES LESLIE of Newgrange, in May 1737, being on death-bed, disposed certain subjects, worth about L. 60 Sterling yearly, to Archibald Leslie his eldest son, and the heirs of his body; which failing, to the children of his second son John Leslie, excluding John himself from the succession. And the disposition is burdened with L. 20 Sterling yearly, in name of jointure, to Violet Johnston spouse of the said Archibald Leslie. In March 1738, Archibald Leslie being also on death-bed, and having no hopes of issue, disposed the fore-said subjects to James and Elisabeth Leslies, children of his brother John, bearing to be for fulfilling his father's disposition; and specially ratifying the said provision of L. 20 Sterling yearly in favour of Violet Johnston his spouse. John

Leslie, after his brother's death without issue, being now heir apparent to his father, brought a reduction on the head of death-bed of his father's settlement, concluding particularly against the jointure provided to Violet Johnston. The defence was, that this settlement was ratified by Archibald Leslie, at that time heir-apparent.

Answered, This ratification was executed also on death-bed.

Replied, That a ratification, granted by an heir apparent, is not one of those deeds that can be challenged upon the head of death-bed; the rule of law is, that a man upon death-bed cannot alienate his estate in prejudice of his heir; but every deed done upon death-bed, whereby a third party happens to be deprived of an expected succession, is not reducible. A man dies, leaving a son and daughter of a first marriage, and a son of a second marriage; if the eldest son die in apparenacy, the second son will be heir to the estate, yet there is nothing in law to bar the eldest son from making up his titles, even upon death-bed, though, by this step, the second son will be excluded by the sister. In short, the law restrains proprietors from disinheriting their heirs upon death-bed; but bars not any rational deed, such as a ratification of a predecessor's settlement, though the consequence may be to set aside one who would otherwise succeed. *2do;* *Esto* a ratification were a deed of that nature to fall under the law of death-bed; yet one requisite is wanting to found that reduction, which is, that the pursuer must qualify himself to be the defunct's heir in that subject of which he is deprived by the defunct's deed; but the pursuer, though heir to his brother Archibald, who granted the deed challenged, is not heir to him in the subject with regard to which the deed is executed, but is heir to his father in that subject.

' THE LORDS assoilzied from the reduction.'

Rem. Dec. v. 2. No 56. p. 84.

1753. July 31.

Mr JOHN GOLDIE *against* The TRUSTEES of MURRAY of Cherrytrees.

MARGARET MORISON, proprietor of the lands of Maison-Dieu, when fifteen years of age, and on death-bed, executed a settlement of her estate in favour of James Murray of Cherrytrees. She died about four weeks after the date of this deed, without heirs.

Mr John Goldie, her uncle by the mother's side, obtained from the Crown a gift of the said lands of Maison-Dieu, as having fallen to his Majesty as *ultimus bares*.

In consequence of this gift, Mr Goldie raised a declaration of his right, wherein he called Mr Murray of Cherrytrees; and concluded for reduction of the

No 8.

The Crown's donatar, on a gift of *ultimus bares*, is entitled to pursue a reduction of a disposition of lands granted by the last possessor, upon the head of death-bed.

No 8. deed granted in favour of Mr Murray by Margaret Morison, as being granted during her minority and on death-bed.

Mr Murray died during the dependence ; and the process having been transferred against his eldest son, he refused to enter heir or to defend ; whereupon decret was pronounced in favour of Mr Goldie. After which he insisted against the tenants of Maison-Dieu for mails and duties ; in which process the Trustees, to whom Mr Murray had disposed his estate for certain uses, compared, and were admitted to be heard.

It was *pleaded* for the Trustees ; That, in this case, there was no place for the King's donatar ; because Margaret Morison having executed a disposition of her estate before her death in favour of Mr Murray, the lands thereby belonged to him and not to the Crown ; and though the disposition was executed upon death-bed, yet the law of death-bed being introduced singly in favour of heirs, as appears from the statutes Willielmi, cap. 13. and from the deeds being valid if consented to by the heir, and as it is a limitation of that natural right which a man has of disposing upon his property, it is not to be extended in favour of the Crown or its donatar ; for the Crown does not succeed as heir, but takes the estate *tanquam bona vacantia* as belonging to nobody. Any difficulty which occurs upon this point, arises from an abuse of words, the King being said to take as *ultimus hæres* ; but there is in this case really no succession, but there being none to succeed in the character of heir, the right vests in the Crown *jure coronæ*. That the matter ought to be thus considered, appears from Craig, tit. *de Regalibus*, § 30. And Lord Stair treats of this right not under the head of succession, but in b. 3. t. 3 § 47. under the general title of CONFISCATION, where he has these words : ‘ *Ultimus hæres* may seem to be a succession from the dead, and to come in amongst other heirs ; yet though it hath the resemblance of an heir, because it hath effect where there is no other heir, and makes the heritage liable to pay the defunct's debts, it is only a caduciary confiscation of the defunct's estate, with the burden of his debt, but no proper succession to him therein.’ And therefore to extend the law of death-bed in support of an escheat or caduciary confiscation, or to defeat a settlement of an estate executed by the defunct who had no agnates or lawful heirs, whilst *sane mentis* though on death-bed, would be extremely hard, and would be an extension of the law of death-bed, to a case which does not fall within the reason or purview thereof. And though a bastard cannot dispose of his heritage on death-bed in prejudice of the Crown, it will not from thence follow, that another person, who has no heirs, cannot dispose of his ; for the reason why a bastard cannot dispoise, is because he has not *testamenti factionem ob defectum natalium* ; and a disposition on death-bed, even of heritage, is considered as a testament or *donatio mortis causa*.

As to the other reason of reduction, founded on Margaret Morison's minority, this depends on the same principles with the other ground of reduction upon the head of death-bed ; and therefore the same answer will suffice ; the restraint

upon minors is in favour of their heirs, and he who challenges the deed must be heir, and qualify the lesion; but surely it was no lesion for a minor to dispose her estate to prevent its becoming caducuary or being confiscate.

Answered for the pursuer; 1st, That the law of death-bed was introduced in favour of all sorts of heirs, whether those succeeding *ab intestato*, or those named by the defunct when in health; and there is no reason for denying the benefit of this law to the King, who, though in some particulars he differs from other heirs, not being universally liable for the defunct's debts, yet succeeds, and is considered as heir, Stair, l. 4. tit. 13. Besides, the law of death-bed was not introduced singly in favour of heirs, but likewise in favour of dying persons, that they might be free from undue solicitations; and because they are presumed not to have sufficient firmness of judgment for disposing of their heritage. This is the account given of the matter *Reg. Mag.* l. 2. c. 18. § 9. *Unde presumitur, quod si quis in infirmitate positus, quasi ad mortem, terram suam distribuere ceperit, quod in sanitate facere noluit, hoc potius ex fervore animi, quam ex mentis deliberatione, everserit*: and by Craig, l. 2. dieg. 1. § 18. With these authors Lord Stair agrees, l. 3. t. 4. § 27. 'The reason of this custom may be conjectured, not only from the nature of feudal rights not disposable by testaments, but only by investiture; but also for public utility, because persons on death-bed are weak, the mind being easily affected by the trouble of the body, and so is easy to be wrought upon by insinuations and importunities to do deeds contrary to their interest and former resolutions.' If these authors are right in the account they give of the foundation of this law, it must take place, whoever is to succeed to the heritage; and there appears no reason why persons who have no heirs *jure sanguinis*, should be exposed to disturbance and importunities when dying, more than the rest of his Majesty's subjects.

2dly, It is admitted, and is proved by the authority of most of our law-books, that a bastard cannot dispose of his heritage, on death-bed, in prejudice of the Crown. Now the King's succession to a bastard is a species of his succession as *ultimus hæres*; for when a bastard has no issue, he can have no agnates, being *ex incerto patre*, and therefore his estate falls to the Crown; and seeing, in such a case, the law of death-bed takes place, there is no reason why it should not also obtain when the King succeeds as last heir, because the defunct left no heirs of blood. It is not owing to a bastard's not having *testamenti factio* that he cannot dispose of his heritage on death-bed; for this right has no connection with the disposal of heritage; no lawful born subject can dispose of his heritage by testament; nor can a bastard dispose of his heritage on death-bed, though the King has by legitimation granted him the power of testing.

3dly, It appears from the tenor of the declarator of the King's right as last heir, that it has been understood, that his right could not be defeated by a death-bed deed; for it calls on all and sundry having or pretending interest, to hear and see it found and declared, that all lands and heritages, &c. which belonged to the defunct at the time of his decease, or at the time of contracting

No 8. 'the disease whereof he died, do belong to the donatar,' &c. Stair, l. 4. tit. 13. p. 582, (604.)

The other reason of reduction, founded on the minority of Margaret Morison, is also relevant; for minors are debarred from altering the course of succession to their lands, because they are presumed, during their minority, not to have sufficient stability of judgment for making such an alteration; and this reason takes place whoever be the heir that is prejudged by the alteration.

'THE LORDS found, that it was competent to the Crown's donatar to object to the disposition granted by the deceased Margaret Morison to James Murray of Cherrytrees, upon the head of death-bed, and sustained the objection.'

Reporter, Justice-Clerk. Act. Advocatus & J. Ferguson. Alt. Lockhart. Clerk, Justice.
Fol. Dic. v. 3. p. 169. Fac. Col. No 86. p. 129.

* * * This case was appealed:

THE HOUSE OF LORDS 'ORDERED, that the interlocutor complained of be affirmed.'

* * * Lord Kames reports the same case:

A DONATAR of *ultimus hæres*, in right of the King, was found entitled to reduce a gratuitous disposition of land as made upon death-bed. It evidently appeared to me, that the Court was here misled by an inaccurate expression. The King is named last heir, not that he is an heir in any proper sense; but only that he has a right *jure coronæ* to all goods which have no proprietor. Yet this expression was the only foundation of the judgment, which bestowed upon the King one of the most extraordinary privileges of an heir.

Sel. Dec. No 51. p. 64.

* * * See case between these parties, *voce* RES INTER ALIOS.

1779. February 4. ALEXANDER GRAHAME against MARGARET GRAHAME.

No 9.

A general service to the heir last infest is not a sufficient title to pursue a reduction *capite lecti*; but the Lords found that the right of apparençy entitled the pursuer to

GRAHAME of Hourston executed an entail of his estate on his five sons *seriatim*, and the heirs-male of their bodies respectively, but did not record the entail.—Charles, the eldest son, succeeded his father, and was infest upon the precept in the disposition of entail.—Upon his death, Henry, his only son, entered into possession of the estate, without making up any titles, and contracted a considerable debt to his sister Margaret, and her husband, Robert Grahame.

Subsequent to this contraction, the entail was recorded; after which, Henry granted a lease of part of the entailed lands to his sister Margaret and her husband for 171 years. Henry possessed the estate for 30 years, as heir apparent,

and died without issue; upon which the succession opened to his uncle Alexander Grahame, youngest son of the entail.

Alexander made up a title, by a general service, as heir of tailzie to his brother Charles, the heir last infest; and, on this title, brought a reduction of the above-mentioned tack by Henry Grahame to his sister, and a removing from the lands, on various grounds; among others, that the lease was granted on death-bed.

No 9.
carry on his
action, tho'
it was object-
ed, that he
was not natu-
ral heir, or of
line, but heir
of provision,
viz. a substi-
tute in an en-
tail.

Objected by the defender to the pursuer's title; The property of the lands leased to the defender is still *in hæreditate jacente* of Charles Grahame, the heir last infest, and cannot be taken up by the pursuer without a special service to Charles.—The pursuer's general service establishes his propinquity, but does not vest in him the right of property in the lands. He has therefore no other title to carry on this action but his right of apparenacy.

A lease of lands, clothed with possession, is a real right in the lands for the time; and, therefore, according to the general principle, cannot be challenged by the heir while the lands are *in hæreditate jacente*.

An exception is admitted in the case of a reduction on the head of death-bed, brought by an apparent heir of line; but it has been found, that this privilege, given to the *natural* heir, does not extend to the heir of provision; Edmonstone *contra* Edmonstone, March 16. 1637, *voce* TITLE TO PURSUE.

But further;—The pursuer is not the apparent heir of Henry Grahame, the granter of the deed, nor can make up any titles to him as his predecessor in the lands.—It is only by serving heir in special to Charles Grahame, the heir last infest, that he can vest himself in the property of this estate. He is, therefore, in the proper and legal sense of the words, the apparent heir of Charles Grahame, and has no connection with Henry Grahame, while the lands are *in hæreditate jacente*.

The pursuer avoids making up his titles to Charles, that he may not be subjected to the debts and deeds of the interjected heir, Henry Grahame, upon the statute 1695.—His conduct, therefore, is *in fraudem* of the statute; and the pursuer ought not to have the benefit of challenging the deeds of Henry Grahame, while, by lying out unentered, he does not become liable for his debts and deeds, as the statute justly requires.

Answered for the pursuer; That, by his general service, he is ascertained to be the heir entitled to take up the succession to this subject; but, without that service, he has sufficient title, as heir apparent, to carry on the present action.—The law has given the privilege of reduction *ex capite lecti* to heirs of provision and tailzie, as well as to the heirs of line.—Consequently there is no room for any solid distinction betwixt the heirs apparent of the one kind and of the other. Both are accordingly now considered as equally entitled to challenge deeds on death-bed granted to their prejudice, though anciently the law might be different in this respect; *vide* Erskine, h. 3. t. 8. § 100.

No 9.

The pursuer is heir apparent to the grantor of the deed.—Before the act 1695, there was reason for considering the interjected apparent heir as a stranger. His successor serving to a remoter predecessor was not liable in implement of his debts or deeds. But now he is made, by such service, to represent the interjected heir, who has been three years in possession, as much as any predecessor to whom he serves;—consequently, before he makes up his titles, he is truly and substantially apparent heir to the interjected heir. This is the meaning which the statute itself puts upon the term Apparent Heir. The statute says, that when he is served, ‘he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir.’

The COURT found, ‘that the pursuer’s general service is no sufficient title to pursue this action: But found, that the pursuer’s right of apparenacy, as heir to Charles Grahame, is a sufficient title to carry on the process of reduction on the head of death-bed.’ See HEIR APPARENT.

Lord Ordinary, Gardenstone.

Act. Stewart.

Alt. Swinton.

Clerk, Menzies.

Fol. Dic. v. 3. p. 170. Fuc. Cal. No 65. p. 122.

No 10.

An heir was not barred from pleading death-bed, by the circumstance that a previous deed had been executed in favour of a stranger.

1779. July 29. WILLIAM FINLAY against WILLIELMINA BIRKMIRE.

WILLIAM BIRKMIRE was twice married.—By his first wife he had four daughters, and executed several deeds in 1764, settling different parts of his succession on them and their children.—In particular, he disposed some buildings in the town of Paisley to Agnes, his youngest daughter.—This deed contained a power to alter, *even on death bed*, and a clause dispensing with the delivery.

Soon after Birkmire’s second marriage, he cancelled the disposition to Agnes; and, by a writing upon the deed, mentioned the cancellation to have been 30th September 1772. Of the same date he executed a new settlement, disposing the subject to himself in liferent, and the children of the second marriage in fee.

Birkmire died 14th November 1772, leaving an only child of the second marriage, Willielmina Birkmire.—After his death, William Finlay, son and representative of Birkmire’s second daughter, brought an action as one of the heirs at law to his grandfather, against this child and her tutor, for setting aside the deed 1772 on the head of death-bed.

Pleaded in bar of this action: The heirs of law have no title to challenge the deed 1772. They were not hurt by it, as their right to the succession was excluded at that time by the previous deed 1764 in favour of Agnes.—It was *jus tertii* to them, whether Agnes should succeed, or any other disponent come in her place. Agnes is the only person who is affected by the new settlement;

but she is barred from any challenge of it by the reserved faculty contained in the disposition to her.

The cancelment of the deed 1764 does not remove the objection. It is an established point, that an implied revocation of a former deed will not entitle the heir at law to challenge the new deed *ex capite lecti*. An implied revocation has all the effects of an express revocation.—They are substantially the same; and, on this principle, the Court repelled the claim of the heir at law, in a case where the deed contained an express clause revoking the former settlement; Crawford against Crawford, June 16. 1749, *vide* TITLE TO PURSUE.

But, at any rate, the cancelment of the deed in this case cannot be considered as opening the succession to the heir at law.—It only took place at the time the new settlement was executed. They were both parts of the same transaction executed *unico contextu*; and the object of the granter evidently was, to alter one destination of heirs for another; but, in no event, to admit the heirs at law.

Answered for the pursuer; It is not sufficient to bar the heir at law from insisting in a challenge *ex capite lecti*, that a previous deed in favour of a stranger had been executed. The deed must likewise remain during the life of the granter, neither cancelled nor taken out of the way by a subsisting deed of revocation. If either of these take place, the heir at law returns to his right of succession.

It may be admitted, that the same effect will not be given to a revocation merely implied from the terms of the death-bed deed.—In that case, the consequence of setting aside the death-bed settlement will be, to take away the implied revocation, and open the succession to the disponent in the former deed, who, therefore, has the only right to bring the challenge.—But the effect of cancelment is to destroy the deed altogether, and put the disponent in the same situation as if it had never existed.—The cancelled deed, therefore, can be no bar to the succession of the heirs at law; and, consequently, it is not *jus tertii* in them to challenge the death-bed deed.

The judgment was, ‘SUSTAIN the pursuer’s title to insist in the present process of reduction of the deed challenged *ex capite lecti*.’ See TITLE TO PURSUE.

Lord Ordinary, Gardenston.

Act. J. Campbell.

Alt. Rolland.

Clerk, Tait.

Fol. Dic. v. 3. p. 170. Fac. Col. No 89. p. 173.

S E C T. II.

Whether Competent to Heirs of Provision.

1676. June 16. MITCHELL *against* the CHILDREN of THOMAS LITTLEJOHN.

No II.

A person, although bound by contract of marriage to provide the conquest to himself and the children of the marriage, was found entitled, on death-bed, to grant a rational provision to his second wife, to the extent of the dead's part. *4*

KATHARINE MITCHELL, by her contract of marriage with Thomas Littlejohn, is provided 'in liferent to an annualrent of 750 merks yearly;' and by a posterior writ during the marriage, the said Thomas declares, 'That if the marriage should dissolve within year and day, the contract should stand valid for the annualrent of 600 merks yearly, and obligeth himself, his heirs and executors, to pay her the same during her life;' whereupon she pursues his children, as heirs and executors, to make payment; who did *allege* absolutor, because by the defunct's first contract of marriage with the defender's mother, he received 8,000 merks of tocher, and is obliged to wair and employ other 8,000 merks for the bairns of the marriage; and there is a several clause of conquest in these terms, 'That whatsoever lands, heritages, goods or gear, he shall happen to acquire during the marriage, he shall take the same to himself and wife in conjunct fee, and the bairns of the marriage;' by which provision, the defenders, being bairns of that marriage, are creditors, and the father could not in their prejudice evacuate this obligation in favours of this wife, or her children, either by contract of marriage, or other provision, as *inter vivos*, or by legacy; but all his means acquired in the first marriage can only belong to the bairns of that marriage. *2do*, This writ granted, *stante matrimonio*, can have no effect, because by the foresaid contract of marriage, the defunct's whole means, acquired during the marriage, being destinate for the bairns of the marriage, the bairns are heirs of provision in the whole means, and cannot be prejudged by legacies, or any deeds done on death-bed: And it was offered to be proven, that this writ was granted on death-bed, in so far as the defunct had contracted the disease whereof he died, and though he was induced by his wife to go to kirk and market, of design to validate this deed, yet he was not able to make it out by evidences of health, for he did not expose himself to the market or kirk of Edinburgh, where he lived, but was carried in a coach to Leith, accompanied with persons confidants to the wife, and yet he staggered ere he went in the coach, and vomited by the way. It was *answered* for the pursuer, that it was offered to be proven, that albeit the defunct went in a coach to Leith, and was accidentally sick by the way, yet that he walked freely unsupported up and down the market of Leith, which is all the law requires for evidences of health, which infers the presumption *juris et de jure*, not admitting a contrary probation that he appeared sick.

THE LORDS ordained witnesses to be examined *hinc inde*, anent the condition of the defunct, when he made this writ, and of his manner of going to kirk and market, but reserved to themselves to determine how far clauses of conquest of this nature are effectual.

And now the cause being called as concluded, it was *alleged*, that the clause of conquest does not constitute the children simply as creditors, but only in so far as they crave implement according to the destination; but though the implement were perfected, the father remains fiar, and the children heirs of provision, and therefore they do represent the defunct, and are liable to all his deeds and obligations, and so to this obligation in favours of the pursuer: And though it were proven that this deed were on death-bed, yet the privilege of death-bed doth secure the heir, but noways the executors; and therefore all deeds on death-bed will exhaust the executry, and will be valid either as debts or legacies; for clauses of conquest are never understood to bind up the contractor from the disposal of his means during his life, but only that what remains undisposed of at his death, which was conquest during the marriage, should belong to the heir of the marriage, with the burden of his debts; and it is so likewise in clauses in favours of wives, who cannot acclaim the liferent of the things acquired during the marriage, unless they remain in the property of the defunct at his death, otherwise such clauses being common, most men would turn liferenters, and ground would be laid for wives and children to inhibit and pursue men for implement of any thing they had acquired, which would ruin their freedom and their commerce; but such clauses import only a destination of succession, and do pass, of course, without notice, especially among merchants, tradesmen, and other minor people: and, in this first contract of marriage, there is a special provision of 8000 merks, beside the general clause of conquest. It was *answered* for the defenders, that all heirs of provision are creditors, and do not simply represent the defunct, but *qualificate*, and therefore are not liable to all his debts and deeds; but at most for such as are for onerous causes, but not for any gratuitous voluntary deed, such as this wife's provision is; and if it were otherways, children would be generally destroyed, and contracts of marriage evacuate in favours of the wives and children of posterior marriages, and whatever might be pretended in favours of this pursuer by her contract of marriage, which is accounted a cause onerous; yet the marriage being dissolved within year and day, all returns *hinc inde*, and the onerousness ceases, and this posterior provision is merely gratuitous, therefore can have no effect, either as a legacy or debt against the defenders, whether as heirs or executors, because the whole executry must be employed for the bairns, as heirs of the marriage.

THE LORDS found, That such clauses of conquest did not hinder the contractors to dispoise during their life, and that all onerous obligations might affect their means, or their children as heirs of provision, as also all other deeds done without fraud upon reasonable consideration, although not for an equivalent.

No 11.

cause onerous, and therefore the contractor may dispose or legate upon such reasonable considerations; but found that any deed, without any reasonable consideration, was fraudulent and null in so far as it is prejudicial to the clause of conquest; and found that there was a reasonable consideration to give a gratification by provision to this wife, in case the marriage dissolved within year and day, and therefore sustained the provision in so far as it was suitable to her husband's estate, but that it could not exceed the dead's part of the free moveables.

Fol. Dic. v. 1. p. 211. Stair, v. 2. p. 426.

* * * Dirleton reports the same case;

MR LITTLEJOHN taylor, by contract of marriage with his first wife, ——— Clerk, was obliged to provide whatsoever lands, money, or other moveable goods he should acquire during the marriage, to himself and to the heirs of the marriage. And thereafter having married a second wife, ——— Mitchel, and having provided her to an annualrent, he did grant a right to her a little before his decease, when he was on death-bed as was alleged, whereby he declared, that, in consideration that his wife had been very dutiful, and it was not reasonable that, if the marriage should dissolve before year and day, she should want altogether the benefit of her jointure; therefore he wills, that though he should decease before year and day, she should have a right to the said annualrent, as it is restricted by the said writ to less than she was provided to: And that the contract of marriage and infestment thereupon should be effectual *pro tanto* in the case foresaid; and is obliged to pay the said annuity.

This deed being questioned upon these grounds; 1. That he could not do any deed in prejudice of his heirs on death-bed; 2. That the conquest being provided (as said is) to heirs of his first marriage, both as to lands and moveables, he could not by the foresaid deed, being a mere donation, prejudge the children of the first marriage;—upon occasion of the said question, the LORDS thought fit to consider what the import of such clauses of conquest should be understood to be, the same being so frequent; and there being *hinc inde Angustia*, and difficulties on both hands; seeing, upon the one, it may appear hard, that a husband should be restricted by such clauses too much; and on the other hand, that such clauses should be ineffectual, and in the power of the husband to evacuate them, seeing all obligations ought to be understood *cum effectu et ut operentur*;—and in end it was resolved, that the said clause of conquest, being conceived in the terms foresaid, in favours of the heirs of the marriage; the husband doth not cease to be fiar, so that, for onerous causes, he may dispose of whatsoever he acquires; and the heirs of the marriage will be liable to his deeds and obligations thereanent: 2. It was thought, that the husband could do no deed *in fraudem* of the said clauses, and of purpose to frustrate the same: 3. Though some of the LORDS were of the opinion, that the husband could not

dispose of the conquest, but for onerous causes; yet others thought, that he might dispose thereof, without fraud, and for rational causes and considerations; as in the case in question, upon the considerations above mentioned, in favours of a dutiful wife; and it was so found by the major part; albeit others thought indeed, that the husband, notwithstanding of the foresaid clauses, might provide a second wife, and his children by her, out of the conquest during the first marriage, if he had no other estate, and the provisions be competent; but that, in the case in question, the deed foresaid was a donation, which the children of the first marriage, being creditors by the said clause of conquest, might question.

But the LORDS found, That if the said deed was on death-bed, the defunct having not only granted an heritable right, but having obliged himself, his heirs and executors, to pay the said sum, his executry and deads-part would be liable to the said obligation; even as to moveables acquired during the first marriage, which may appear not to be without difficulty; seeing, as to the conquest, during the first marriage, there could be no deads-part, the same being provided to the children of the first marriage, as said is.

Though the heir of the marriage may renounce to be general heir, and may take a course to establish the conquest, either in his own, or in the person of an assignee to his behoof, and so not be liable to the defunct's obligation without an onerous cause; yet it is to be considered, whether, if they should be served heirs of the marriage, they would be liable to the same, seeing all heirs represent the defunct *suo ordine*, and are *eadem persona*? Or if they be liable only to the defunct's deeds and obligations for onerous causes?

Item, If such provisions be not in favours of the heirs of the marriage, but only of bairns; whether the bairns will be liable to the defunct's debts? And if all the bairns will be liable to the same, as heirs of provision?

It is thought, If infestment follow in favours of the father and the bairns of the marriage, they must be heirs of provision to him; and, that all the bairns (if it be not otherwise provided) will be heirs of provision.

But these points did not fall under debate. *In presentia*.

Act. Cuningham.

Alt. Dalrymple.

Clerk, Hamilton.

Dirleton, No 359. p. 174.

1708. July 19.

KATHARINE EDMONSTOUN, and Mr STEPHEN OLIPHER, her Husband *against*
JAMES EDMONSTOUN.

JAMES EDMONSTOUN having granted a bond of provision to his younger children, and the portions of the deceasing to accresce to the survivors; Katharine Edmonstoun, one of these children, with the concurrence of Mr Stephen Olipher

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No 12.

A bond of provision, granted to a child by her father on death-bed, who, by his

No 12.

contract of marriage with her mother, was bound to provide the children of the marriage to the fee of a certain sum, was sustained, as being, in effect, but a division of the sum and implement of the contract.

her husband, pursued James Edmonstoun, her eldest brother, as heir to his father, for payment of her own provision of 5000 merks, and a proportion of her younger brother's, falling to her through his decease.

Alleged for the defender; Absolvitor; because the bond of provision was granted on death-bed; and he had raised reduction ex eo capite, which he repeated by way of defence.

Replied for the pursuer; That the father was bound, by his contract of marriage, to employ 20,000 merks in favours of himself and his future spouse, in conjunct-fee and liferent; and of the heirs and bairns, one or more, to be procreated betwixt them in fee: And the bond of provision was nothing in effect but a division, which the father has always the power of even in articulo mortis.

*Duplied for the defender; Uicunque the death-bed deed had it related to the obligation in the contract as its antecedent onerous cause, might have subsisted; yet, not having any relation thereto, but being in the terms of a separate provision, and made on death-bed, it cannot stand in prejudice of the heir. Nor is it enough for the pursuer to restrict the import of it to what might fall to her share of the 20,000 merks by her mother's contract of marriage; because, the death-bed deed being null in law, can have no effect at all, by the rule *quod nullum est, &c.* Besides, there was no faculty of division of the 20,000 merks reserved to the defunct, nor did he exercise any such faculty; on the contrary, *hoc non voluit*, but only that the death-bed bond of provision should be binding, *quod facere non potuit.**

THE LORDS sustained the bond, and repelled the defence of death-bed; in respect of the anterior onerous cause by the contract of marriage.

Ed. Dic. v. l. p. 211. Forbes, p. 126.

No 13.

A person was bound, in his contract of marriage, to provide the conquest to the heirs of the marriage. This found to hinder him from disposing of his moveable estate on death-bed.

1722. February.

ROBERT MAXWELL against NEILSON of Barncailly.

THE deceased Robert Neilson of Barncailly, in his contract of marriage with Elisabeth Stewart, having provided the conquest to the heirs of the marriage, granted a legacy upon death-bed of 500 merks to Robert Maxwell.

Death-bed being *objected*, it was *answered* for the legatar, The law of death-bed extends not to moveable subjects, which any proprietor may freely dispose of upon death-bed, unless in so far as he is restricted by the wife and children; the law has thought it proper, only to tie up people absolutely as to their heritable subjects, that they cannot alienate these upon death-bed, leaving moveables more free, as generally of less consequence: And the law of death-bed does not consider the heir *simply*, if he be prejudged, but if he be prejudged in an heritable subject; and therefore the moveables will be liable for this legacy,

equally as if they were not provided to the heirs of the marriage; or being provided to the heirs of the marriage, as if the legacy had been granted in *liege poustie*, by way of disposition *inter vivos*. And thus it was determined, Mitchell *contra* Children of Littlejohn, 16th June 1676. No 11. p. 3190.

Replied for Barncailly, heir of the marriage, That the law of death-bed takes place against every deed done upon death-bed, to the prejudice of the heir; and that indifferently, whoever be the heir, whether of line, tailzie, or provision; and whatever be the deed, whether an alienation of subjects in themselves heritable or moveable.

THE LORDS found, That the clause of conquest in the contract of marriage, did hinder the father to dispose on his moveable estate upon death-bed.

Fel. Dic. v. 1. p. 212. Rem. Dec. v. 1. No 32. p. 64.

1738. December 16.

CAMPBELL against CAMPBELLS.

No 14.

ONE having become bound in his contract of marriage to provide a certain sum, and also the conquest during the marriage, to himself and spouse in conjunct-fee, and to the children to be procreate of the marriage in fee, did purchase an estate during the marriage, taking the rights thereof to himself, his heirs and assigns, and upon death-bed did execute a deed, settling both heritable and moveable estate upon his eldest son, with the burden of certain provisions, in favour of the younger children; in a reduction of this settlement, at the instance of the younger children, upon the head of death-bed, the LORDS were unanimous, that seeing there was no actual settlement of the conquest in terms of this obligation, to constitute the children heirs of provision, they had not the privilege of death-bed; that they were constituted creditors by this obligation, and in whatever way a service in general as heir of provision or conquest may have crept into our practice, it is, strictly speaking, inept; such a thing, while the father is alive, cannot be, and if he died without implementing, the obligation is purified in favour of the children, and they have a direct action against their father's representatives to make over the conquest in their favour. See APPENDIX.

Fel. Dic. v. 1. p. 211.

S E C T. III.

Competent to the Remoter Heir, after the immediate Apparent Heir's decease.

No 15.

The Lords found, that a disposition made *in lecto*, may be reduced, not only at the instance of the apparent heir living at the time, but he dying, at the instance of the heir who succeeds him.

1668. *January 21.* JANET SCHAW *against* MARGART CALDERWOOD.

JANET SCHAW pursues a reduction of a liferent infeftment, granted to Margaret Calderwood by the pursuer's father, as being *in lecto*. The defender *alleged* no process, because the pursuer was not heir the time of the disposition, but another heir apparent, who never entered.

THE LORDS repelled the defence.

The defender *alleged*, That this being a liferent infeftment to her by her husband, and but of a small value, it was valid, and the husband might discharge that natural debt of providing his wife on death-bed, she having no contract of provision before.—The pursuer *answered*, That the defender might take the benefit of her terce, which is her legal provision, beyond which, a deed on death-bed (in prejudice of the heir) is null, and this liferent is of the husband's whole estate; and yet the pursuer is willing it should stand, it being restricted to a third of the rents of the lands.

THE LORDS sustained the infeftment only for a third.

Fol. Dic. v. 1. p. 212. Stair, v. 1. p. 511.

1672. *July 16.*

MARGARET GRAY and her SPOUSE, *against* JOHN GRAY and Others.

No 16.

Found as above.

UMQUHILE MICHAEL GIBSON having but one daughter, married to John Gray, did dispoise certain tenements, which were all his heritage, to his daughter, and the said John her husband, the longest liver of them two in conjunct-fee, and to the heirs betwixt them; which failing, to the husband's heirs; and after his daughter's decease, Janet Gray, the only daughter of that marriage, enters heir to Michael Gibson, and with concurrence of David Scot her husband, pursues reduction of the disposition granted in favours of her father, as being done by her goodsire on death-bed, to the prejudice of her mother, who was immediate heir, and herself who was subsequent heir.—The defender *alleged* absolutor, *imo*, Because this pursuer was not immediate apparent heir the time of the disposition; and it is only competent to the immediate apparent heirs to quarrel their predecessors deeds on death-bed; *2do*, The mother, who was immediate apparent heir, homologated and acquiesced in this right, in so far as her husband and

she bruiked the tenements disposed thereby for several years, and she did never reclaim or raise any pursuit in the contrary ; and it is certain her naked consent though she was but apparent heir to the disposition *in lecto*, would not only exclude herself, but all other apparent heirs to quarrel the same.

THE LORDS repelled both these defences, and found that the pursuer, as subsequent apparent heir, had interest to reduce ; and that the mother's possession with her husband, did not import homologation or consent.

The defender further *alleged*, That this disposition can only be reducible, in so far as it was prejudicial to the apparent heir, his wife, or this pursuer ; *ita est*, that the husband would have had his liferent-right of the tenements, by the courtesy of Scotland, if he had not been infeft in the fee by this disposition ; for he would have infeft his wife as heir to her father ; and therefore his infeftment must stand, at least *quoad* his liferent, by which the heirs were not prejudged.—It was *answered*, That seeing the husband rested upon his right, and did not actually infeft his wife as heir, he cannot claim his liferent, neither by this infeftment, which is an infeftment of fee, and not of liferent, nor by the courtesy, which is only competent to the husband when his wife is infeft as heir.

THE LORDS ordained the parties to be heard upon this point *in prasentia*.

Fol. Dic. v. 1. p. 212. Stair, v. 2. p. 101.

* * * Gosford reports the same case :

IN a reduction pursued at *Margaret Gray's* instance, of a disposition of lands made by Michael Gibson, the pursuer's goodsire, in favours of her mother and her husband in liferent, and the heirs of the marriage in fee ; which failing, in favours of the husband's heirs, upon this reason, that it was made *in lecto agnitudinis* against the husband and his creditors, to whom he had disposed the lands for most onerous causes ;—it was *alleged* for the defender, That the pursuer not being apparent heir the time of the disposition made by the goodsire to her mother, who was then alive, could not reduce the same *ex capite lecti*, which is only sustained in favours of apparent heirs for the time.—It was *replied*, That the mother being now dead, the said right did accresce to the pursuer, who was the only apparent heir to the goodsire.—THE LORDS did repel the defence in respect of the reply.

2d, It was *alleged*, That the apparent heir had homologated the right made to her husband and herself, in so far as she had suffered him to possess the same during her lifetime, without intimating any reduction of his right.—It was *replied*, That being a naked tolerance in favours of her own husband, could not be interpreted a homologation.—THE LORDS did likewise repel the said allegation, seeing she could not intent action, being clad with a husband, unless he

No 16. had authorised her; and that during her lifetime, the husband, *jure mariti*, would have had the benefit thereof.

3th. It was *alleged*, That if the reduction should be sustained at the pursuer's instance, yet it can only take effect so far as the mother could not be prejudged thereby, being apparent heir, *pro rata* she ought to be repaid to have been heratrix of the said lands, and by the courtesy of Scotland, the husband liferenter thereof: So that his creditors being in *bona fide* to contract with him either as fiar, or at least as having right by the courtesy, they ought not to be prejudged of the rent of the lands during his lifetime.—It was *answered*, That by our law there could be no courtesy but where the apparent heir is infest, without which she cannot be an heratrix, unless by a retour or precept of *clare constat*, whereupon infestment followed, the fee of the estate belonging to the father had been settled in her person.—THE LORDS did sustain the *allegance* founded upon the courtesy, and found, that the mother, who was apparent heir, being infest in herent conjunctly with her husband, before there were any heirs of the marriage to whom the fee was provided; that the creditors, during the standing of that right, and before reduction, were in *bona fide* to conceive that she and her husband were both conjunct fiars, and so might lend their money in contemplation of that right, which, if it had been quarrelled during his wife's lifetime, she might have been infest as heir; and therefore, she being dead, the nearest heir, her daughter, ought only to have right as to the fee, but not to deprive the husband, or his creditors, who had the benefit of the courtesy. See HUSBAND and WIFE.

Gosford, MS. Nos. 509. 510. 511. p. 270.

No 17. 1722. July 13. KENNEDY against ARBUTHNOT.

ONE upon death-bed having disposed his estate to his infant son, and the heirs of his body; whom failing, to certain extraneous substitutes; and the son, his only child, having died without issue;—in a reduction at the instance of the nearest heir, it was *objected*, That the privilege of death-bed is not competent to a remote apparent heir, where the apparent heir for the time is not lesed. THE LORDS repelled the objection, and sustained the action at the instance of the remoter heir.

Fol. Dic. v. 1. p. 212.

* * See This case *voce* BLANK WRIT, No 22. p. 1681.

1739. February 3. & 13.

MARGARET and JANET CRAIGS against The MALTSMEN of Glasgow.

A DISPOSITION was granted *in lecto* to certain trustees for the behoof of the disponent's only child, her heirs and assignees, in case she lived or attained to the age of 21; but in case of her decease before marriage, or 21 years of age, for behoof of the poor of the maltmen of Glasgow. And the child having died before majority or marriage; is a reduction at the instance of the next heir, the Lords 'found the disposition to have been not only in prejudice of the remoter heir, but also in prejudice of the nearest heir at the time, she being an infant, and the estate upon her failure, even in infancy, provided to strangers; and therefore that it was reducible *ex capite lecti*, without prejudice to the defenders continuing in possession till they should be heard upon their claims, on which they pleaded at least a partial onerous cause.'

Fol. Dic. v. l. p. 212. Kilkerran, (DEATH-BED.) No 2. p. 151.

SECT. IV.

Competent to a Wife;—and to Children.

1628. July 10.

CANT against EDGAR.

ONE Cant pursues Edgar, for payment to the relict of umquhile Edward Edgar, of the third of her umquhile husband's moveable goods. The said umquhile Edward being cautioner for umquhile Mr William Maxwell of Carvens, to his creditor, in an heritable bond; in the which bond, the said Mr William was obliged for his relief, and the said umquhile Edward being compelled, and having paid the sum, and dying before he was relieved, it was controverted if that relief contained in the heritable bond should be estimate an heritable sum, and so pertain to the heir of the cautioner; or if it was moveable, so that the relict would have in law her third thereof; which the defender alleged could not be found moveable, seeing he alleged that the relief was of the nature of the bond given to the creditor, which was heritable; likeas the defunct had, in his own lifetime, obtained decreet against the principal, for whom he was cautioner and had paid, for re-payment of the principal sum, with the bygone annualrents, and decerned him to make payment also in time coming of the yearly annualrent, ay and while he were re-paid, whereby the same pertained to the defunct's

No 18.

A substitution in a disposition to the nearest heir was reduced, at the instance of a remoter heir.

No 19.

A wife cannot be affected in her right to a third of moveables, by a deed on death-bed.

No 19.

heirs, and not to his executors, who could not have right to sums for which annualrent was running to be paid in time coming; and so the relict could not claim a third thereof; likeas the defunct, before his decease, had made David Johnston assignee thereto, and to his said relief, to the effect he might comprise the principal party's lands, to the use of his bairns, whereby he had expressed his own intention, that he willed that the said sums should be heritable; all which was repelled, and the said sums found to be moveable, and not to pertain to the heir; and consequently, that the relict had right to her third, wherein the LORDS found that she was not prejudged by the assignation made by her husband, and by the comprising deduced thereupon by the assignee, and infestment following on the comprising; seeing the said assignation was made by the husband on his death-bed; at which time, the LORDS found, he could do no deed, neither to his bairns or any other, to prejudice her in her third of the moveables; likeas they found the said relief to be of the nature of moveable sums, notwithstanding that the principal bond was heritable, *quoad creditorem*, in so far that the same would pertain to his heir, and not to his executors, and this notwithstanding of all the arguments above-written. In this process it was also questioned, if a bond bearing this clause was heritable or not, viz. whereby the debtor was obliged to pay to his creditor a sum at a certain term, as destinated to be laid upon land for annualrent; and in case of failzie, to pay at that term L. 100 of penalty; but he was noways obliged to pay the annualrent, by any clause of the bond. This point was not decided, albeit most of the LORDS esteemed the bond of this tenor to be moveable, because the destination to employ a sum for annualrent, was not thought sufficient, except according thereunto, the sum had either been employed, or else that the debtor had been expressly obliged in the bond to pay annualrent, while the re-payment thereof.

Act. Stuart & Nairn.

Alt. Hope & Peirson.

Clerk, Scot.

Fol. Dic. v. 1. p. 212. Durie, p. 386.

1634. March 15.

BROWN against THOMSON.

No 20.

A man, on death-bed, cannot gift away his lying money, further than his own half or third.

MARGARET BROWN being married upon one Thomson her husband, who died within the year after their marriage, she pursues the heir of her said husband for repetition of her tocher, viz. 2500 merks, which, by his discharge, he had granted was paid to him; and the defender *alleging*, That the discharge could not burden the heir, because it was subscribed by the defunct on his death-bed, and so could not prejudice the heir; and the pursuer *replying*, in fortification of the discharge, That the sum was really numerate and received by the defunct; the defender *duplicated*, That the enumeration was elusory; for instantly after, a form of enumeration was made to the defunct, he being then on his death-bed,

immediately rendered back again the sum to the payer of the same; and the pursuer *replying*, That albeit he had given it back again, yet the discharge must bind his heir; seeing the sum being once given to him, and so being beside him as a moveable sum, if he had given the same to any other, it was lawful for him so to do, and the doing thereof could not have prejudged the pursuer to have repeated the tocher discharged; even so, the giving of the sums to the pursuer liberates not the heir of the burden of the discharge, which makes him liable for the defunct's receipt of the tocher, in respect of the law, which provides repetition where the parties live not year and day, there being no bairns procreate betwixt them.—THE LORDS found, in respect of the discharge and real payment, albeit the discharge was made on death-bed and also, albeit the money was instantly re-delivered; that the heir of the defunct was liable to pay again the half of the sum discharged and no more; for they found that the defunct, by way of testament or legacy, might leave his own part, which is testable, to the pursuer; and so, by the like consequence, that the giving of the tocher back again was effectual, in respect of the discharge, granting receipt to make the defender liable for the half, as his legacy, which struck upon his own part, and so did affect the half; and therefore decerned the defender to pay to the pursuer the half of the sum contained in the discharge.

Act. ———.

Alt. Gibron.

Clerk, Scot.

Fol. Dic. v. i. p. 212. Durie, p. 713.

1679. January 29.

JOHN AIKMAN, Goldsmith in Edinburgh, against DAVID BOYD's RElict.

THE LORDS found, seeing the assignations did not exhaust the defunct's whole moveables, that the general legacy was only to be extended to the *superfluo posteriore testamento rumpitur prius*, and so might consist with the assignations; but if the assignation had been of all the moveable estate, it would have been decided otherwise; for the LORDS distinguished this, viz. that assignations made and delivered on death-bed, were not of a testamentary nature *quoad legatarios*; but fully excluded them from all part of the sums assigned; but acknowledged they were of a testamentary nature as to the interest of the relict, children, creditors, commissars *quot*, and confirmation dues, as has been decided.

Fol. Dic. v. i. p. 212. Fountainball, MS.

1682. February.

MANNER against DAVIDSON.

A MOTHER having taken a bond bearing annuities, and an obligation to infest, to herself in liferent, and to her second son in fee, and the heirs of his body; which failing, to such of his brothers and sisters, and their children, as

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No 21.

The wife and children cannot be prejudged by any deed on death-bed, more than the heir.

No 22.

Whether competent to children born post hereditatem delatam?

No 22.

she should name in his lifetime ; he died without children, after he had made a nomination on death-bed. The eldest brother, who was debtor in the bond, raised reduction of the nomination *ex capite lecti*, as done to the prejudice of him as heir of conquest, at least as one of the heirs substitute in the bond.

Alleged for the defender ; That the clause to infest could not make the bond be repute conquest, no infestment having followed ; *2do*, The act of Parliament anent the disposing in prejudice of heirs, ought to be understood of heirs general, not of heirs substitute, who might be otherwise strangers.

THE LORDS found, That a person on death-bed could not prejudice heirs substitute more than other heirs ; and found, that the pursuer was one of the substitutes, and that the nomination on death-bed was invalid ; and that therefore the whole brothers and sisters, and their children born, when *hereditas* was *delata*, came in as substitute, and *per capita* ; but that those born *post hereditatem delatam* by the death of George the creditor, were not to be reputed substitutes. But this last point was but overly reasoned. It was much debated that the brothers, &c. were not called substitutes in the bond, but only the creditor was by his faculty to determine the substitutes ; and so the brothers not nominate could not be looked on as heirs, and consequently could not quarrel *ex capite lecti*.

Harcarse, (LECTUS ÆGRITUDINIS.) No 649. p. 179.

No 23.

An assignation to moveables on death-bed was found valid, where the cedent had neither wife nor children to challenge it as done to their prejudice.

1683. March 15. SANDILANDS *against* SANDILANDS.

IN the competition betwixt Sandilands and Sandilands, it being *alleged*, That the pursuer's right was an assignation to a moveable bond upon death-bed, and so ought to be confirmed ;—it was *answered*, That albeit an assignation was granted upon death-bed, yet it was granted *admodum inter vivos*, and intimated before the granter's death, who was thereby denuded ; and that a moveable right, such as the bond assigned, was transmissible by an assignation and intimation upon death-bed.—THE LORDS found, That in this case, where the granter had neither wife nor children, who might pretend they were prejudged, that the assignation and intimation, albeit upon death-bed, did sufficiently denude and convey, without necessity of confirmation.

Fol. Dic. v. 1. p. 212. P. Falconer, No 59. p. 39.

No 24.

1683. March. MR JAMES HENDERSON *against* SAUGHTONHALL.

A BOND, heritable by bearing annual rent, is confirmable, and falls under executry, if the creditor die before the term of payment ; and sums lent out upon heritable security by a person *in leato ægritudinis*, do not prejudice his relict and bairns.

Fol. Dic. v. 1. p. 212. Harcarse, (EXECUTRY.) No 454. p. 124.

S E C T. V.

Whether Competent to the Creditors of the Defunct.

1669. November 25.

The CREDITORS of COUPER and BALMERINO *against* LADY COUPER.

THE deceast Lord Couper having made a disposition of his whole estate in fee to his Lady, and thereby having excluded the Lord Balmerino, his apparent heir therein, Balmerino being unwilling to enter heir to Couper, before he knew whether the disposition would stand or not, moves some of Couper's creditors, and some of his own creditors having charged him to enter heir to Couper, to insist in the reduction of the disposition made to the Lady, as being done by Couper, *in lecto agritudinis*. It was *alleged* for the Lady, no process at the Creditors of Couper's instance, *first*, Because they insist only upon personal bonds, granted by the Lord Couper, and have no real right to the land, and so cannot reduce a real right, but upon a real right; so till they have apprised the lands they have no interest. *2do*, Albeit Couper's Creditors might reduce the disposition, as betwixt conjunct persons, without an onerous cause, yet not upon the reason, *ex lecto*, because that is a privilege particularly competent to heirs, but not to creditors, as they are creditors; unless by real diligences, they state themselves in place of the heir, and so make use of his right and privilege. It was *answered* for the pursuers, That in that they were creditors, they had sufficient interest to crave it to be declared, that the estate of Couper should be affected with apprisings upon Couper's debts due to them, notwithstanding this disposition, which is all the effect of this reduction; and as they may, without any real right, reduce, or declare as aforesaid, upon the act of Parliament 1621, against fraudulent dispositions, so they may declare that any disposition done on death-bed, as it could not prejudice the heir, so it cannot prejudice the creditors of the defunct, or his apparent heir, but that they may affect the said estate, with their legal diligences. It was *answered* for the defender, that she repeats the former defence, and further *alleges*, that she is content to take off the interest of Couper's own Creditors, and to declare that the disposition shall be burdened with their debts; but adhered to her defence against Balmerino's Creditors, who, though they produce an apprising yet it is posterior to the summons, and their personal debts can be no sufficient title, nor is there any produced. It was *answered* for Couper's Creditors, that the declarator in their favours was no way sufficient, nor would give them a real right, nor prevent the diligence of other creditors. *2dly*, If they had a good interest to reduce, and thereupon to apprise, no offer could take away that interest but payment.

No 25.

Reduction on the head of death bed is competent to the defunct's personal creditors, for he can no more prejudice them by any deed done on death-bed, than he can prejudice his apparent heir.

No 25.

THE LORDS found the Creditors had sufficient interest upon their personal bonds to insist upon the reduction, *ex capite lecti*; but they found that a real security given to Couper's Creditors, equivalent to an apprising and infeftment, was sufficient to exclude their interest.

Fol. Dic. v. 1. p. 212. Stair, v. 1. p. 653.

1714. June 24. The CREDITORS of ALEXANDER LINDSAY competing.

No 26.

The contrary found, on the ground that death-bed is a privilege competent to the heir only, or those in his right.

IN the competition of the Creditors of Alexander Lindsay for the office of executry before the commissaries of Edinburgh, compearance was made for the relict, who craved and obtained preference for the half of the household plenishing provided to her by her contract of marriage, with an obligation to free the same of all debts.

Compearance was also made for Janet Forbes, the defunct's grand-daughter, who craved to be conjoined with the other creditors, upon a bond for 1000 marks granted by the defunct her grandfather upon death-bed, for love and favour, and other onerous causes; and the Commissaries, upon inquiry, accordingly admitted her *pari passu* with the other onerous creditor.

There were several bills of advocacy from the commissaries upon iniquity. And it was *alleged* by the Creditors, That the relict had no preference for the household-plenishing, because the property of the plenishing remained with the husband, who had the absolute power and disposal of the plenishing during his life; likewise a creditor of the defunct's might have affected these moveables by arrestment or poinding at any time during his life, which would have carried the property without any reparation to a wife so provided; and the property not being conveyed, it remained with the husband at his death, and the wife is but a creditor, and must come in *pari passu* with the remanent creditors. The reason why the commissaries gave this preference, appears to be because, by the course and practice of several commissariots, relicts have been preferred to all creditors for the whole provisions in their contracts of marriage; and that was a debateable question before the Lords, till the case betwixt Keith and Leith, determined on the 17th of February 1688, in order to establish a rule in time coming, and then it was found, that the wife had no preference; which has accordingly been followed as a rule ever since, and was particularly so found 19th of February 1713, the Creditors of James Cleghorn against his Relict. And upon the same ground, the Lords, on the 23d of February 1714, found, that this very relict of Alexander Lindsay had no preference for the aliment of the family, till the next term after her husband's death; so that now a relict is only to be considered as a common creditor. (See Those cases *voce* PRIVILEGED DEBT.)

It was answered; That the case of relicts have ever been favourable; and although of late the relict's preference for all the provisions in her contract has not taken place, yet a disposition to a share of moveables in a contract of mar-

riage *per verba de presenti*, with an obligation to free the same from debts; put the relict in a special case from other creditors for liquid sums; for thereby the relict is a creditor upon the particular subject, and as a special legatar has preference to other legatars, so the wife has the same ground of preference to common creditors.

It was *replied*: The wife by law has interest in the half of the husband's moveables where there are no children, as in this case, but with the burthen of the half of the moveable debts, which often times reduces her share in effect to nothing; and the provision in the contract imports no more but an obligation to relieve these moveables of the husband's debts, which can only state her in the case of a common creditor; if there be sufficiency either of heritage or moveables, she will want nothing, if not, she ought to bear a share.

'THE LORDS found the relict had no preference.' See HUSBAND and WIFE.

It was *alleged* for the onerous Creditors; That the commissaries had committed iniquity in conjoining the defunct's grand-daughter *pari passu* with them, because her bond was gratuitous and on death-bed.

It was *answered*; That the defunct had a sufficient unincumbered estate to satisfy all his debts heritable or moveable, and thereby was in capacity to give a gratuitous bond, which is no defraud of creditors, there being a fund sufficient for paying all. 2do, Neither was the reason of death-bed competent to the creditors to quarrel the bond, because that was only the privilege of the heir, and therefore any deed on death-bed, with consent of the apparent heir, or ratified by the heir, is good from the date, or from the ratification; and suppose that the creditors who can by their diligence be in place of the heir, could in other cases quarrel deeds on death-bed, yet in this case the bond is ratified and corroborate by the heir.

'THE LORDS found the Commissaries had committed iniquity, there being a sufficient unincumbered estate in heritage and moveables for payment of the whole debts, and the bond quarrelled being corroborate by the heirs; but if the creditors called the sufficiency of the defunct's estate in question, reserved reduction upon the act of Parl. 1621, as accords.'

Fol. Dic. v. 1. p. 213. Dalrymple, No 110. p. 153.

SECT. VI

Death-bed Deeds are Effectual, and afford *jus exigendi*, unless Challenged by the Heir.

1581. January 16. THOMAS DICKSON against JOHN C——.

THERE was one Thomas Dickson, son to Allan Dickson, burgess of Edinburgh, who being made assignee to ane decret obtained be his father against

No 27.
An heritable
bond, without

No 27.
infestment,
was alienated
on death-bed.
As our ancient
laws mention
only *terra et
tenementa*, it
was found not
to fall under
the law of
death-bed.

umquhile John C., the whilk decreit was obtained against the said umquhile John, decerning him to infest the said Allan in certain annualrents heritable, persewit John C., as nearest and lawful heir to the said umquhile John his father, to hear and see the said decreit transferred *active et passive*. It was *alleged* be the defender, that the persewar could have no action as assignee to the decreit to pursue for the translation of the same, because the assignation was null in itself, being made be the said umquhile Allan Dickson, eodem die quo fecit testamentum, et sic in lecto ægritudinis. Et secundum jus regni prout in rubrica c. l. 2. in fine legum burgorum, ubi fit mentio de consuetudine partium in Scotia; nullus burgensis potest terras, quas hereditarie possidet, in lecto ægritudinis alienare, vel quas in sanitate sua acquisivit ab herede, nisi ære alieno esset oneratus, et heres non potest eum in necessitate sua relevare. But so it was that the said assignation of the decreit to infest heritable in annualrents was equivalent to heritage, et sapiebat naturam movabilium, et alienationis terrarum. To this was *answered*, that the law of the Majesty could not be extended to assignations and debts, but only to heritage, where infestments or sasines were obtained of the same. The Lords, after long reasoning among themselves, voted for the most part and would not give process upon the said assignation, and admitted the allegiance that it was made *in lecto ægritudinis*.

Fol. Dic. v. 1. p. 213. Colvil, MS. p. 316.

1626. July 12.

L. CRAIGIE-WALLACE against WALLACE.

No 28.
An assigna-
tion being
challenged as
done on
death-bed,
the exception
was not re-
ceived, being
proponed by
the debtor,
although the
bond assigned
was heritable,
and he alleg-
ed, he was
not *in tuto* to
pay to any
except the
heir; but
the Lords or-
dained the as-
signee to find
caution to
warrant the
debtor at the
heir's hands.

LAIRD Craigie-Wallace borrows from David Fullerton 8,000 merks; David, on his death-bed, makes Wallace of Menford assignee, which assignee having obtained the bond registrate at his instance, charges for payment; which charges are suspended, and the said assignation also by action desired to be reduced, both upon one reason, viz. 'That the assignation was made by the defunct, upon his death-bed;' this bond being heritable, and so in prejudice of the heir, who could not be prejudged by the defunct on his death-bed; and the suspender could not be *in tuto* to pay to this assignee, seeing he would be compelled to pay the same again to the heir, who hath the only right thereto. This reason was not sustained at the debtor's instance, seeing the assignee was ordained by the Lords, to find good caution to warrant the suspender at the heir's hands; likewise the cedent, by his missive letters written to the same assignee before his sickness, confest the money to pertain properly to the assignee, and that his name was only borrowed thereto; and in the same letters promised to make the charger assignee; whereby the LORDS found, that this reason was not competent to this debtor, he being also put *in tuto* by caution to warrant him at the heir's hands, as said is. And where the assignation was quarrelled in this same process by the debtor, as not sufficient, because it was subscribed by two notaries, whereas the maker thereof could write himself; this was repelled,

because it was made by the cedent on his death-bed ; neither was it found necessary to prove, that it was subscribed in his death-bed, seeing the assignation itself bore, ' That the notaries subscribed for him, because he was then unable, ' being in his sickness upon his death-bed, to subscribe himself ;' and which the said notaries, in their subscriptions of the said assignation testified, and which the Lords found sufficient to qualify that it was done upon death-bed, without any other probation.

No 28.

Act. *Lowrie.*

Alt. ———

Clerk, *Scot.**Fol. Dic. v. 1. p. 213. Durie, p. 214.*

1628. February 16.

ROBERTSON *against* DEBTORS.

In an action betwixt Robertson and her Debtors, the pursuer being relict of her husband, and being made assignee by him to certain bonds and sums, contained in the assignation therein specified, addebted by the Debtors to the husband, and done long before the decease of her husband, pursues the Debtors contained in the assignation, for payment of the moneys owing by them. The pursuit upon this assignation was sustained at the relict's instance, both for the bond of heritable sums, and also of moveable sums, whereto she was made assignee by her husband, notwithstanding that the Debtors *alleged*, That the same assignation made by the husband to the wife, could not be sustained to produce this action, being made to prejudice the heir and executors of the defunct ; and that this assignation could not be respected in their prejudice, but for the relict's own part, or as a testament ; which allegiance was repelled, seeing it was not alleged, that the assignation was made on the maker's death-bed ; neither was it ever alleged to be revoke by the husband before his decease, after the making thereof ; neither was the assignation quarrelled, either by the heir or executors of the defunct ; and it was not competent to the Debtors, to quarrel the same upon this ground.

No 29.

Found not competent for debtors to object to an assignation granted upon death-bed, by a defunct to his wife, of certain sums, both heritable and moveable, as being in prejudice of the heir and executor, when they themselves did not challenge it.

Clerk, *Scot.**Fol. Dic. v. 1. p. 213. Durie, p. 346.*

SECT. VII.

Against what Deeds the Law of Death-bed Strikes.

1568. March 16.

ANDERSON *against* ANDERSON.

No 30.

Found that, conform to the *leges burgorum*, a bur-gess may alienate lands on death-bed, for payment of his debts contracted prior thereto; but that in this case, the heir must be first required to pay the said debts, and to maintain the clinique *in lecto*.

In ane reduction moved be Wa. Anderson, oy and air to Patrick Anderson, bur-gess of Perth, against George Anderson, the said Patrick Anderson's second son, to whom his father had sold ane tenement of land in the said burgh, in the time of his sickness whereof he deceased, it was excepted be the defender, that his father had necessities with money, both before his sickness and in time of the same; and seeing that the said father had conquest the said tenement himself, he might sell the same to pay his debts taken before his sickness, and to sustain his necessities the time of his sickness, according to an law writt in *legibus burgorum*; the which allegation was found relevant; and, after the admitting the same, the pursuer alleged, that the said alienator had sufficient in moveables to have paid the alleged debts, and to have supported his own necessities, if he had lived half an year longer nor he did, and as the said pursuer being his air was sufficient to have paid his debts, and also made support of the said necessities; in respect of the which, the defender should have required the said air, before he had made such alienation in his death-bed; the which reply the Lords found relevant to take away the exception that was before found relevant.

Fol. Dic. v. 1. p. 212. Maxwell, MS. p. 234.

1621. March 10.

LA. DUNLOP *against* THOMAS DUNLOP.

No 31.

Found that a tack may not be disposed upon death-bed in prejudice of the heir.

Pronounced and declared to serve for a practise for ever, notwithstanding of whatsoever preceding practiques.

Fol. Dic. v. 1. p. 213. Kerse, MS. fol. 140.

1624. January 7.

SHAW *against* GRAY.

No 32.

The law of death-bed strikes at

In an action betwixt Shaw and Gray, for reduction of a bond made by a woman called Shaw, to whom the pursuer was brother and heir, given to the said

Umphra Gray defender, containing the payment to him of 600 merks, the reason being, that the bond was made *in lecto ægritudinis*. THE LORDS found that reason relevant, viz. That the bond was made by the party thereby obliged, she at the date thereof being diseased of a sickness, whereof she never convalesced, but whereof she died, about the space of seven weeks thereafter; which reason was sustained, albeit the defender *alleged*, that the same ought not to strike upon bonds made for payment of moveable sums, which might be made upon death-bed, and that the municipal law, whereupon the reason was founded, was only to restrain parties to make alienations of their lands and heritable rights, in prejudice of their heirs upon their death-beds; and also *alleged*, That in this case, this bond cannot be reputed done *in lecto ægritudinis*, in respect that the party, maker of the bond, at the date thereof, and by the space of six weeks thereafter, was of good health, to administer her lawful affairs, and in that same estate for sickness as she was in by the space of an whole year before, viz. that albeit she kept the house for the indisposition of her body, having a lent sickness of hydropsie all that time, yet she lay not bedfast, but rose daily and put on her clothes, and went up and down the house; which allegiance was repelled, seeing the party alleged not, that she came out to kirk and market, or at least did other deeds of health, equivalent to such outcoming; and found, that the law struck as well upon moveable bonds, as upon deeds done in heritage; for upon the moveable bonds, the heritage might be comprised, and so the heir thereby prejudged; and albeit it was a lent-sickness, *et non morbus santicus*, the reason was found relevant. And because the party to whom the bond was given was an apothecary, who *alleged*, that the bond was made to him for drugs, and satisfaction of his cure ministrated by him, during the whole space of her being in sickness; the LORDS found, that they would sustain the bond *pro tanto*, viz. for the prices of his medicines, as should be proven to have been furnished to her by him, and also for such further sum, as in the end of the cause should be modified by the LORDS, for satisfaction of his pains and for his art.

Act. Hays et Oliphant.

Alt. Nicolson, jun. et Russel.

Clerk, Hays.

Fol. Dic. v. 1. p. 213. Durie, p. 95.

No 32.

moveable bonds as well as heritage, since for these also the heritage may be comprised, and so the heir prejudiced.

A moveable bond sustained to an apothecary for the price of drugs furnished.

No 33.

A bond was sustained, tho' granted on death-bed, being for goods furnished.

The Lords repelled an allegation, that another bond by the same

1632. July 13.

POLLOCKS against FAIRHOLM.

SOME Pollocks being served heirs to Robert Halliday, pursue reduction of two bonds of some moneys made by him, as being done on death-bed, and so in prejudice of his heirs. The defender *alleging*, that these same bonds were given of these sums for furnishing made to the defunct, viz. for furnishing of malt, as much as extended to 500 merks, which was the sum contained in the one bond, and which was at sundry times made to him, and whereupon the

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clinique was for furnishing made to his father. They refused to sustain the bond for these, except it were alleged, that the defunct was heir or executor to his father, whereby law would have obliged him to pay the sums.

said parties having compted, finding it to amount to this sum, he then made and subscribed this bond ;—the LORDS found this allegiance relevant, to sustain the bond, albeit it was made on death-bed, the forefaid real furnishing being proven to have been really made, equivalent to the said sum, and which the LORDS found probable by witnesses, the furnisher also giving his oath upon the truth of the furnishing after probation. And it being also *alleged* for the other bond, containing other 500 merks, that the creditor had recovered this bond, for satisfaction of the like sums owing before to him, and particularly which he had furnished to the defunct's father, which then the defunct took on him by his bond to pay ;—the LORDS found this allegiance relevant for so many of the sums, as the defender should prove furnished to the defunct's self, but repelled that part of the allegiance, anent the furnishing made to the defunct's father, for the which they would not sustain the bond, except it were alleged that the defunct was heir or executor to his father, whereby in law he would have been liable to pay sums addebted by his father to this defender.

Clerk, Gibson.

Fol. Dic. v. 1. p. 214. Durie, p. 645.

1635. July 30.

RICHARDSON and the LORD CRANSTON RIDDEL *against* SINCLAIR.

No 34.

A sale of lands, though for a reasonable price, was reduced *ex capite lecti*.

UMQUHILE Sir Robert Richardson, father to the pursuer, having dispoed his lands of Pencaitland to John Sinclair, heritably and irredeemably, for the sum of four score and five thousand merks, whereof 30,000 merks were appointed to be paid to the said Sir Robert's eldest daughter, and 32 or 33,000 merks were appointed for payment of debts owing to his creditors, and the rest was divided among the rest of his bairns, viz. 7000 merks to his second son, other 7000 to his second daughter, and the rest, viz. about 10,000 merks to his eldest son ; and the said John Sinclair, being thereupon infeft, holding of the superior, the said Sir Robert thereafter, about the space of one year or thereby dies; before whose decease, the said John intends an action of declarator against the said umquhile Sir Robert in his lifetime, and against the said pursuer, his son and apparent heir, to hear it found and declared, that the undoubted heritable right and property of the said lands pertains to him, by virtue of the said alienation ; after execution of the which summons, and citation of the said parties, the said Sir Robert died before any further process was deduced in that action ; after whose decease, the said Sir Robert his son, dispoes his right of the lands to my Lord Cranston Riddel, and his right to reduce John Sinclair's securities ; and the said Sir Robert being served and retoured general heir to his father, the said Lord Cranston Riddel pursues for reduction of the said contract and disposition made by the father to the said John Sinclair, upon this reason, as done *in lecto ægritudinis* to the heir's prejudice ; in which action, the retour being quar-

relled, as being done after advocacy, and after the judge was discharged to proceed; this allegiance was repelled, in respect that the judge was, by the letters of advocacy, only discharged to proceed, ay and while John Sinclair was warned to the day of the service; and the pursuer offered to prove, that he was lawfully warned and cited before the day of the service, to compare to the service, in respect whereof, that being proven (as it was admitted by the LORDS to probation) the retour was sustained. And it being further *alleged*, That this right made to the Lord Cranston Riddel, was null, and could not be sustained to produce this pursuit, but the party ought to be assoilzied therefrom; because, by act of Parliament, it is declared, that it is not lawful to the LORDS of Session to buy pleas or actions, or rights pleadable; and this action was of this nature, in respect of the nature of this process, and that the defender had intented his declarator before the right was made to the Lord Cranston Riddel. This allegiance was also repelled, for the said declarator being only execute, but never called in judgment, nor other process deduced thereon, it was found, that the buying of the right libelled by the Lord Cranston Riddel, was not of a litigious right, which came under the compass of that act of Parliament; also, the LORDS found, that the certification of the act of Parliament being express, that such buyers of pleas should be deprived of their offices, it ought not to be extended further, as to the tinsel of the plea, but left to the defender to pursue for depriving of the pursuer: But the act of Parliament declares, that it shall not be lawful to buy any plea, *ergo* it would appear that if it be not lawful to buy, therefore that such writs are not lawful, and consequently, that such unlawful writs are null, and cannot produce action, but it was repelled *ut supra*. Also, the LORDS found the reason of reduction relevant, although it was *alleged*, that the said alienation could not be quarrelled as done *in lecto agritudinis*, seeing the maker thereof was not affected with any such sickness as might be called *lectus agritudinis*, and which was an impediment *rebus agendis*, and which is called, in law, *morbus senticus*, for his disease was lent sickness, which kept him continually in one estate, by the space of two year together before his decease, viz. a palsy in the one arm and leg; likeas, this alienation was made a year or thereby before his death, at the time whereof, and continually thereafter, he had sound and perfect judgment, and did all his affairs as any other healthful provident man used to do; and, as he himself used, before his sickness, both in directing of his business, guiding of his rents, subscribing of his writs, and in his diets, at bed and board; likeas, this alienation being made for the causes within written, of satisfying of his creditors, and of his eldest daughter, which were done, contracted, and perfected, before ever he contracted any sickness, and when he was in full and entire health, and the rest of the sums appointed to his bairns unprovided, which was a lawful act to do, so long before his death, his eldest son being also provided to the rest of the sum of the price, and whose provision the father could not enlarge, in respect the price would extend to no more; and also, that the eldest son had so estran-

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ged and misbehaved himself to his father, that his father with difficulty was moved to provide any thing to him: And also, that the defender was content yet to supply and pay, what more price the judge should think expedient should be paid for the lands; all which were rejected by the LORDS, and the reason sustained, seeing the party came not out to kirk and market after the alienation, without which had been done by him, the alienation was found could not be sustained; neither was it respected, that the party was of sound judgment; for they found, that the sickness of the body, albeit of never so long endurance, and albeit the judgment was whole, if the party continued unrecovered, and came not to public places, but died thereof, was a just cause to reduce the alienation, although made also for preceding just causes; which the LORDS found not enough to sustain the same in prejudice of the heir, as said is; but the reducer was ordained to repay to the defender, the just sums for which the alienation was made, and truly debursed.

Act. *Advocatus.*Alt. *Nicolson & Craig.*Clerk, *Hay.**Fol. Dic. v. 1. p. 215. Durie, p. 766.*

No 35.

Found, that a father on death-bed cannot make any provision in favour of his children, altho' unprovided, which might burden the heir with payment, and that the maxim was universal for all, as well children as strangers.

1637. July 1. LORD CRANSTON RIDDEL *against* RICHARDSON.

UMQUHLE Sir Robert Richardson of Pencaitland, having given a bond in favours of his second son, 'obliging him and his heirs to pay to the said second son, 8000 merks for his provision, and portion-natural, and for help of his living,' which bond being made by him, he then being sick of a palsy, whereof he lived a year and an half after the date of the said bond, which being desired to be reduced at the instance of the heir of the maker, viz. his eldest son, and at the instance of the Lord Cranston Riddel, to whom the said heir had sold the lands, whereto he succeeded by his father, and so as he whose lands might be distressed upon some pretext, through the said bond, upon this reason, that the said bond was null, being made by the defunct upon his death-bed, to the prejudice of his heirs. And the defender *alleging*, 'That this bond being granted by the father to his lawful bairn, who had no other benefit provided to him by his father, and who had no other thing to succeed to by his decease, neither moveable nor immoveable, but this bond, it ought not to be found under the compass of this reason, as a null deed, specially where the maker lived so long after the date thereof, and continued in this lent sickness, which sickness cannot be found, and was not of itself of the nature of *morbus santicus*, and which is not *impedimentum rebus agendis*, and which cannot be an impediment to hinder the father, to provide his children to their natural portions, according to his estate; at least the quantity for which it may be sustained against the heir (there being no other moveables pertaining to the defunct the time of his decease) ought to be modified and determined by the LORDS; for the which quantity so to be modified, the bond ought to be sustained, and ought not to be re-

duced *in toto*; for albeit persons on death-bed may not burden their heirs, yet the mind of the law is, that they cannot do such deeds as may take away the heritage from them, which ought to be understood to take it from them directly, and to give it to a stranger; but that they may not provide a *legitime* to their own bairns, they being then of sound judgment, albeit in sickness, and therewith to burden the heir, where the heritage is not thereby evicted; albeit it may be thereby something burdened for so just a cause, ought neither to be found the meaning of the law, nor maxim adduced in this reason; and it is against the law of God, of nature, and all reason, to find that the father, even on death-bed, may not do such a deed, as to provide his bairns, who were destitute of help, and that one should have all. THE LORDS repelled the allegiance, and sustained the reasons; for they found, that the father on death-bed, could not make any provision in favours of his bairns, albeit unprovided, which might burden the heir with payment thereof, and that he could do nothing, but in so far as he might do in his own part in law belonging to him, in so far as concerned his moveables, and that the maxim was universal for all, concerning bairns alike as any other persons whosoever; and found, that no modification ought to be made.

Act. Advocatus.

Alt. Stuart.

Clerk, Hay.

Fol. Dic. v. 1. p. 213. Durie, p. 847.

1665. February 23.

JACK against POLLOCK and RUTHERFOORD.

No 36.

Husbands *in lecto* are not hindered to give liferents to their wives, otherwise unprovided.

MARION RUTHERFOORD married David Clerk, and had no contract of marriage with him, but he having acquired a little ruinous tenement, took it to her and him in conjunct-fee, and in the time of the plague, he provided her to the annualrent of 5000 merks. His heirs raise reduction of the provision, as being *in lecto aegrutidinis*, after he had kepted his house upon suspicion of the plague, of which he died. It was *alleged* for the said Marion, That keeping the house upon suspicion of the plague could not be as *in lecto aegrutidinis*, unless it were proven, that he was infected with the disease, before the provision was granted. 2dly, Even in that case, defuncts are not hindered to give liferents to their wives, for which there is a natural obligation, according to Craig's opinion.

THE LORDS repelled the first allegiance, but found the second relevant, in so far as might extend to a competent provision to the wife, and therefore, having examined many witnesses *hinc inde*, upon the estate of the husband, and the tocher and frugality of the wife, and finding his means did consist in a tenement worth 500 merks by year, beside that inconsiderable tenement, wherein she was infest, they restricted her annualrent, which came to 300 merk, to L. 123, which was about the terce of the tenement, albeit terces of houses within burgh are not due.

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In this process, the wife and her second husband, and having repaired the other little tenement, which was ruinous, and built it much better than ever it was; for which they pursued for the reparations.

THE LORDS found, that they ought to have the reparation decerned, not only in so far as is necessary, but *in quantum*, the heir will *lucrari*, by getting greater mail to be paid at the wife's death, she leaving the tenement in as good case as now it is.

Fol. Dic. v. 1. p. 213. Stair, v. 1. p. 275.

No 37.

1668. January 21.

SHAW against CALDERWOOD.

THE LORDS found, That a wife being provided *in lecto* by her husband, her provision should be restricted and sustained as to a terce, she being no otherwise provided before.

Fol. Dic. v. 1. p. 213. Dirléton, No 141. p. 58.

* * The same case is reported by Stair, Sect. 3. *b. t.* No 15. p. 3196.

No 38.

1676. February 1.

LAWRIE contra DRUMMOND.

A disposition being challenged as on death-bed, the dispoonee alleged onerous causes, and contended, that he was creditor to the defunct by a clause of warrandice. The Lords sustained the disposition as a security of the clause of warrandice; but that the lands disposed upon death-bed might not be perpetually burdened with that relief, they restricted it to distresses occurring within seven years.

WILLIAM LAWRIE having adjudged the lands of Scotstoun upon a debt due by Mr John Drummond the apparent heir, and to his own behoof, pursues a reduction of a disposition of the saids lands granted by Sir Robert Drummond to Sir John Drummond, as being done on death-bed, which disposition bears, 'For love and favour, and for divers onerous causes;' whereupon the Lords did formerly find, that the disposition was sustainable, in so far as an onerous cause could be instructed; and thereupon Sir John having produced several debts due by Sir Robert to him, doth now insist, upon this ground, that Sir Robert was debtor to Sir John by the clause of warrandice of the lands of Meidhope, disposed by Sir Robert to Sir John *in liege poustie*, which not being for an equivalent cause onerous, anterior creditors might reduce the same, in which case Sir John could have no recourse upon the warrandice, the estate going to a singular successor; and it cannot be questioned but a disposition on death-bed, making a personal warrandice real, was for an onerous cause, and not reducible.

THE LORDS sustained the disposition as a security of the clause of warrandice of Meidhope, providing that any distress upon that clause be timeously intimate, and that Sir John make use of all the rights he hath to exclude the distress, either by virtue of Sir Robert's disposition or otherways; and that the lands may not be perpetually burdened with that relief, they restricted the

same to distresses occurring within seven years ; seeing the Lords did extend the disposition beyond the express tenor of it, to what was just for Sir Robert to have granted, or wherewith Sir John might have affected the lands of Scotstoun, if they had been in another man's person ; therefore the Lords found that they might qualify the same in these terms.

No 38.

Fol. Dic. v. 1. p. 214. Stair, v. 2. p. 408.

* * * Gosford reports the same case :

IN the reduction at Blackwood's instance, of the disposition of the lands of Scotstoun, as being made *in lecto*, in so far as it was not for an onerous cause adequate to the worth ;—it was *alleged* for Sir John, That he could not be obliged to dispo in favours of the pursuer, as having adjudged from the apparent heir of Sir Robert Drummond, but with the burden of the absolute warrandice of the lands of Meidhope, whereby Sir John was obliged to relieve Sir John of all cautionries, and, in contemplation thereof, the lands of Scotstoun were disposed, which was a most onerous cause. It was *replied*, That the defender being satisfied of all just and onerous causes that he could now instruct, the pursuer not being heir to Sir Robert, but a creditor to the apparent heir, and having adjudged his right, the lands of Scotstoun ought to be adjudged to him free of any such warrandice, unless the same were real, and did affect the same before Sir John's disposition, without which the creditors had only personal actions against his heirs or representatives. It was *duplicated*, That this pursuit being to the behoof of the apparent heir, upon his own bond, voluntarily granted, and the pursuer Blackwood having no interest, the disposition ought to be qualified with the warrandice, unless Mr John, the apparent heir, would serve himself heir to Sir Robert, in which case the defender, by inhibition, or legal diligence, might secure himself from emergent cautionry, otherwise Sir John could never get his relief, seeing the lands of Scotstoun may be disposed with consent of the apparent heir, against whom no inhibition could take effect, Blackwood not being personally tied, and Mr John having renounced to be heir.—THE LORDS did find, that the disposition of Scotstoun ought to be affected and burdened with the debts and cautionries wherein Sir John stood obliged for Sir Robert Drummond, which could be presently instructed, or should be emergent within seven years, which they thought was sufficient time for discovering all such engagements, seeing it was not imaginable the creditors would delay so long, to their prejudice, to pursue for payment and satisfaction, where there were so many intricacies ; but, as to such cautionries, they found that it was most just that the disposition should be affected, it being granted that the reduction was to the behoof of the apparent heir, who, of purpose, did renounce and take that way, that he might be free of all actions com-

No 38.

petent against him if he had entered heir ; so that it was just that either he should enter, or the disposition of the lands be affected.

Gosford, MS. No 845. p. 535.

No 39.

Bonds granted on death-bed, although they do affect only the dead's part, yet are preferable to legacies left in the ordinary way ; for the defunct is in *legitima potestate* as to affecting his part, and granting of bonds to that effect.

1676. December 14. MITCHEL against LITTLEJOHNS.

UMQUHILE Thomas Littlejohn, by his first contract of marriage, provided his whole conquest, during the marriage, to the bairns of the marriage ; shortly before his death, he granted a bond of provision to the bairns in satisfaction of their portions natural, and what they could crave of him ; and having married Catherine Mitchel, he provided her, by her contract, to 720 merks yearly ; and, by a posterior bond, he obliged himself, his heirs, executors, and assignees, to pay her 600 merks yearly in case the marriage dissolved within year and day. Which the LORDS sustained, notwithstanding of the prior clause of conquest, in so far as might extend to the third of the moveables. The said Thomas did also grant a legacy to Andrew Littlejohn, his brother, for several gratitudes, containing an obligation upon his heirs, executors, and assignees, to pay the same, with condition that he accepted the tutory of his bairns. The account being remitted to an auditor, he did report, that the bairns provision exceeded the two parts, and therefore they craved to be preferred to the relict and the legatar ; because, albeit their bond was due on death-bed, yet there is no law nor custom restricting the power of persons on death-bed as to dead's part, but they may grant legacies or bonds as *inter vivos*, betwixt which there is this difference, that those who get bonds on death-bed are creditors ; and albeit their bonds be not effectual against the heir's bairns, or wife's part, against whom neither the obligations nor declarations of defuncts are valid, yet they are fully valid against the executor *quoad* dead's part, and so they are not legatars but creditors ; so that the provision to the wife and bairns being not by way of legacy, but by way of credit and bond *inter vivos*, they are both preferable to the legacy, although it proceed upon rational motives, being no civil debt ; and though it bear an obligation upon the heirs and executors to pay the legacy.

THE LORDS found, that a bond granted by a defunct on death-bed, not by way of legacy, but obliging heirs and executors, was preferable to his legacy.

Fol. Dic. v. 1. p. 213. Stair, v. 2. p. 479.

* * * Dirleton reports the same case :

THE LORDS found, That bonds granted on death-bed, albeit they are legacies, as to that effect, that they affect only the dead's part, yet they are preferable to other legacies left in the ordinary ways of legacies ; and that the defunct was in

legitima potestate as to the affecting of his part, and granting of bonds to that effect.

No 39.

Reporter, *Justice-Clerk*.Clerk, *Gibson*.*Dirleton*, No 402. p. 198.1678. *July 29.*HERIOT *against* LYON, &c.

No 40.

IN a reduction at George Heriot's instance against Hary Lyon, &c. of their bonds, as given *in lecto*, alleged they were but the renewing of old bonds, or else granted for counts of work wrought.—THE LORDS sustained them; but declared they would consider the counts if exorbitant, since it is not like the defunct *in lecto* did it; and also take their oath in supplement on the truth of the work.

*Fol. Dic. v. 1. p. 214. Fountainhall. MS.*1683. *February 27.*EARL of LEVEN *against* MONTGOMERY.

No 41.

THE Countess of Leven, with consent of her curators, having entered into a contract of marriage with Mr Francis Montgomery, wherein she provided him in liferent to the barony of Inchleslie, in case there should be no children of the marriage, or in case the children should decease before Mr Francis, that was declared to be in satisfaction of his courtesy of the whole estate: As also, by the said contract, it is provided, that in case he should have children surviving himself, he was to have the liferent of the whole estate, only he was to pay the current annualrent of the debt; and, by the contract, the Lady, with consent of Mr Francis, was empowered to burden the estate with 10,000 merks, for providing her house with plenishing; and Mr Francis was obliged, after the decease of the Viscount of Kenmore, to apply 50,000 merks, which was his portion, for payment of the debts; and in case the marriage should dissolve without children, the Lady and her heirs were obliged to refund the said 50,000 merks to Mr Francis after her decease, according to the terms of the said contract. The Lady, with consent of Mr Francis, granted bond to Lauchlan Leslie for 10,000 merks. The Lady, upon death-bed, ratifies the foresaid contract of marriage upon oath, and also the foresaid bond for 10,000 merks, which she had granted upon death-bed; she also, upon death-bed, grants a discharge to Lauchlan Leslie her chamberlain of his intromissions with the by-gone rents of the lands, and at the same time disposes her half of the moveables, which were in common betwixt her and Mr Francis, and delivered to him all her jewels, and particularly a jewel which was gifted by the King of Sweden to General Leslie her grandfather as a token, and which her grandfather did legate to the family, with a

The Lords refused to sustain a deed on death-bed, disposing on moveables, *in quantum* prejudicial to the heir's relief of moveable debts.

No 41.

prohibition not to alienate, but that the *samen* should remain with the family of Leven. The now Earl of Leven being served heir of tailzie to the said Countess, has intented reduction of the said contract of marriage, and of the said 10,000 merks bond, and a declarator, that the bygone rents and moveables, belonging to the Lady the time of the marriage, should not belong to the said Mr Francis *jure mariti*, but should be applied for payment of the moveable debts which were due before the marriage; and also concludes a reduction of the discharge and disposition foresaid, as being to the prejudice of the heir's relief of moveable debts, and concludes that the King of Sweden's jewel may be delivered back, as being provided to remain with the family; and that the other jewels, being of several kinds, did fall to Leven, as being heirship, at the least as being *paraphernalia*, belonged only to the wife's executors, and consequently were liable for her debt, and so to relieve Leven the heir of moveable debts. There is also a contrary declarator pursued at Mr Francis's instance. The reason of reduction insisted on by Leven, was against the contract, that the *samen* was granted in the Lady's minority to her lesion; and whereas it bears, that the barony of Inchlesly was provided to Mr Francis in lieu of the courtesy, curators could not transact in relation to a contingent event, the courtesy not being likely to have fallen out, she being a sickly Lady and affected with a rupture, who, by the judgment of physicians and skilled women, was not fit for marriage; and that the transaction was not equal, being only in the case, that either there should be no children, or that the children should die before the father; but in case the children should live, then he was to have the liferent of the whole estate without restriction.—THE LORDS found, that the Lady and her curators might provide Mr Francis her husband to a competent liferent, and might transact in relation to the courtesy; and that this provision was not exorbitant. The *second* reason of reduction was against the 10,000l. bond, as granted likewise in her minority, and to her lesion, seeing Mr Francis, being her husband, ought to have provided the moveables for the house; and that the heir could not be burdened therewith, seeing there was sufficiency of bygone rents in the hands of the tenants and chamberlains, which ought to have been applied for furnishing of plenishing; and that Mr Francis had carried away the moveables bought.—THE LORDS sustained the reason of reduction against the 10,000l. bond, and ordained Mr Francis to discharge the *samen*, and him to bruik the moveables alleged bought therewith; and declared these moveables should not fall under the division, so as the heir could claim a part thereof, as falling under the Lady's executry, for his relief of moveable debts. The *third* reason of reduction was, that the contract of marriage ought to be reduced, because the curators had omitted to provide thereby, that the bygone rests of rents due by the tenants and chamberlains, which were eight or nine years mails and duties, should have been applied for payment of the Lady's debts, viz. counts and bygone annualrents, and that, by that omission, the same did fall under Mr Francis's *jus mariti*; at the least Mr Francis ought to be liable to the heir for his relief in *quantum factus est locupletior* by the *jus mariti*, and that the *jus mariti* in

law gave the husband only right to the wife's moveables, her moveable debts being first deducted.—THE LORDS found, that the wife's moveables, that fall under the *jus mariti*, could not be burdened with the wife's debt but in a subsidiary way, the heritable estate and executry being first discust and exhausted, in regard they found the husband not liable after the wife's death for her debts, so long as there was any heritable or moveable estate belonging to her representatives, which might satisfy her debts, the *jus mariti* being equivalent to a general assignation of the wife's moveables to the husband, and which could not be quarrelled at the creditor's instance, so long as there was sufficiency of the estate for payment of her debts. Likeways, in this reduction, Leven craved that the disposition in favours of Mr Francis, by the Lady, of the half of her moveables in common betwixt them, and the discharge granted by her, with Mr Francis's consent, to Lauchlan Leslie, ratified by her upon oath while she was in death-bed, might be reduced, in regard these deeds, being done on death-bed, could only be sustained as legacies, and so could not prejudice the heir of his relief of the moveable debts.—THE LORDS reduced these deeds, in so far as they were prejudicial to the heir's relief of moveable debts, and that, notwithstanding of the ratification by the Lady upon oath, which they found only personal, but that it could not bind up her heir from quarrelling of the same. In this process there was likeways a conclusion of declarator, craving the King of Sweden's jewel foresaid to be delivered to the pursuer, in regard the deceast Earl of Leven left it to the family, with the quality, that it should not be alienate.—THE LORDS ordained that jewel to be restored back, but assoilzied Mr Francis from giving back the rest of the jewels, they being *paraphernalia*; and found, that the Lady might dispose thereupon in favours of her husband, and that the same were not subject to the heir's relief, as other moveables were. See TAILZIE.—HEIRSHIP MOVEABLES.—HUSBAND AND WIFE.

Fol. Dic. v. 1. p. 213. P. Falconer, No 54. p. 31.

1688. July 20.

ROBERT PRINGLE against ELIZABETH PRINGLE and RUTHERFORD.

FOUND, that bonds secluding executors cannot be disposed upon *in lecto*, in prejudice of the heir, more than such as bear an obligation to infest.

Fol. Dic. v. 1. p. 213. Harcarse, (LECTUS ÆGRITUDINIS.) No 661. p. 189.

1706. July 20.

EDMONSTON against EDMONSTON.

THE deceased James Edmonston gives a bond of provision to Catharine, his daughter, for 5000 merks. She and Mr Steven Oliver, her husband, pursue James Edmonston, her brother, for payment.—*Alleged*, He has raised reduction

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No 43.

A partry, who by a contract of marriage, was bound

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to provide the children in a certain sum, having granted a bond of provision on death-bed to one of them, for a sum something less than the due proportion, but making no mention of the contract of marriage, the Lords repelled the defence of death-bed, and sustained the bond of provision.

ex capite lecti, his father having died shortly after granting it.—*Answered*, 1mo, There is a natural obligation on parents and brothers to provide their children and sisters : This is sufficient to support the bond, it being moderate and alimentary, though on death-bed ; 2do, This has an anterior onerous cause, viz. her mother's contract of marriage, where 20,000 merks are provided to the heirs and bairns of the marriage, whereof these are only three ; and so 5000 merks are less than the proportion of that sum.—*Replied*, Whatever might have been pleaded, if this bond of provision had expressly related to the contract of marriage ; yet here is a simple and absolute bond without mentioning the contract ; and the bond being null as *in lecto, quod nullum est nullos sortitare effectus*, and cannot be supported by a cause to which it noways relates ; 2do, The contract of marriage is fully implemented, seeing the bairns of the same marriage gets it, he being the son and heir thereof ; and it is alike if any of them enjoy the provision ; seeing parents, by their power of division and distribution, may give it to any of the bairns procreate of that marriage, he not going out of that line, nor taking in bairns of another bed.—*Duplied*, When a deed on death-bed can be ascribed to a cause, *ab ante*, preceding his sickness, there law sustains the deed, though it does not expressly mention it ; and it is all one as if there were a pursuit intended upon the obligation of the contract, to give her a share of the 20,000 merks, as a bairn's part of gear, being a child of the marriage ; and so, without multiplying processes, may be admitted by way of reply, *ad finiendas lites* ; 2do, Though he be the eldest son of the marriage ; yet his succession is not by virtue of the contract as heir of provision, but as heir of line.—*Triplied*, Law requires things to be done *habili modo* ; but here the defunct *non fecit quod potuit*, in making the bond relate to the contract and its obligation, *et fecit quod non potuit*, by granting a simple bond *tempore inhabile* when on death-bed.—THE LORDS remembered, that they had lately sustained Carnegie of Kinfaun's obligation as a sufficient exercise of his faculty and reserved power, though it bore no express relation thereto ; and therefore they, in this case, repelled the reason of death-bed, and sustained the bond of provision, in respect of the antecedent obligation in the contract-matrimonial, though not mentioned therein. See FACULTY.

Fol. Dic. v. 1. p. 214. Fountainball, v. 2. p. 344.

* * The same case is reported by Forbes, Sect. 2d, *b. t.* No 12. p. 3193.

1707. July 22.

JANET COWIE and MR DAVID HARDIE, her Husband, for his Interest, against WILLIAM BROWN of Seabegs, JANET COWIE, and Others.

No 44.

A person's moveables, notwithstanding

JOHN COWIE of Bothkenner having granted, for love and favour, to William Brown of Seabegs, Janet Cowie, and others, *respective*, a discharge and some

assignments of some moveable debts due to him ; Janet Cowie, as one of the five heirs portioners of the said John Cowie, her brother, and as creditor to him in 500 merks, raised reduction of the foresaid gratuitous deeds *ex capite lecti*, with a conclusion of declarator, That notwithstanding thereof, the granter's moveable goods and gear are liable to be affected, both for payment of the debt due by him to the pursuer, and for the pursuer's relief of the other moveable debts to which she might be obnoxious as heir.

Answered for the defenders, *1mo*, The pursuer, as creditor, cannot be heard to reduce, except upon the act of Parliament 1621, about deeds *in fraudem creditorum*, which cannot take place here where the defunct was solvent ; *2do*, Neither can she reduce, as heir, the rights quarrelled ; because they relate only to moveables, and none of them burdening or affecting the heritage, and the old statute in the Majesty forbids only the disposing of heritage without consent of the heir ; which, by the rule of *inclusio unius*, &c. argues, that men are at liberty, even upon death-bed, to do what they please with their moveables, except children be wronged of their legitim, or a relict of her share, which is not the case.

Replied for the pursuer ; The defunct could not, by any gratuitous deeds on death-bed, which are of a testamentary nature, prejudice the heir, or any of his own lawful creditors ; for, *1mo*, The moveables of the defunct ought to be burdened and affected with his moveable debt, and he could not dispose of his moveables, except in so far as they were free ; it being a maxim in law, That *bona non sunt nisi debitis deductis*, and so decided, Lady Colvil *contra* Lord Colvil, *voce* SUCCESSION. The pursuer needs not recur to the act of Parliament 1621, she being founded in the common law, whereby legacies can only be of the defunct's free moveables, and if more be legated, they suffer a proportionable abatement. It is not a good defence against all gifts on death-bed, that *debita excedunt bona*, which evinceth that debts are not thereby to be prejudiced : So the LORDS found, that a special legatar could not pursue the debtor, till the executor was called, lest the debts should exhaust even the special legacy, Forrester *contra* Clerk, No 36. p. 2194. ; *2do*, The pursuer has right as heir to crave it may be declared, that no deed on death-bed can directly or indirectly burden or affect the heritage ; and if the persons who have considerable moveable debts were allowed to exhaust their executry by gratuitous deeds, it were easy to evacuate the law of death-bed by exposing the heritage to be swallowed up by the moveable debts.

Duplied for the defender ; The cited decisions are not to the purpose ; for though legacies be affected with the burden of debts ; deeds *inter vivos*, though granted on death-bed, are not ; *2do*, Though the heir is to be relieved by the executor of testamentary deeds, that relief is not to be extended to deeds *inter vivos*, though made on death-bed ; for how can the executor's obligation to relieve the heir, which commenceth but after the defunct's decease, operate *retro*, to reduce an assignation or discharge granted by the defunct to third par-

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ing of gratuitous rights thereof made on death-bed, found liable both to the payment of a debt due by him to his heir, and for the heir's relief of the defunct's other moveable debts, and these rights found reducible *ex capite lecti*, in so far as prejudicial to the heir *qua talis*, or as creditor-

No 44.

ties. True, bonds granted upon death-bed are reducible when they come to affect heritage ; because thereby the law is directly eluded : But here the heir is left only under debts contracted by her predecessor in *liege poustie*, by the withdrawing some moveable subjects from her relief, which is a different case.

THE LORDS found the defunct's moveables, notwithstanding of the discharge and assignations on death-bed, liable both to the payment of the debt due by him to the pursuer, and for the pursuer's relief of other moveable debts, to which she might be obnoxious as heir ; and found the foresaid deeds reducible *ex capite lecti*, in so far as the same prejudice the pursuer as heir or creditor.

Forbes, p. 187.

1709. January 18.

MR ROBERT DARLING, Minister at Eues Kirk, *against* MR JOHN HAY, Son to MR JOHN HAY, Parson of Peebles.

No 45.

An heritable bond being granted on death-bed, in corroboration of a prior bond for the same sum, which prior one carried no obligation to grant further security, the Lords, in a competition betwixt an adjudger and this infester, considered, that though such a bond would not subsist against an inhibitor, unless there had been a previous obligation to grant it ; yet that such privilege was not competent to the heir or his creditor ; and therefore preferred the annual renter.

IN a competition for the rents of a tenement in Linlithgow, belonging to the deceased Humphrey Welsh, betwixt Mr Robert Darling, who had adjudged the same from the heritable apparent heir, and Mr John Hay, who stood infest upon an heritable bond granted to him by Mr Welsh on death-bed, corroborating a former personal bond granted in *liege poustie* ; Mr Darling having repeated a reduction of the said heritable bond *ex capite lecti*, the LORDS repelled the reason of reduction, in respect of the antecedent onerous cause ; albeit it was *alleged* for Mr Darling, That the anterior personal bond was no obligation upon the debtor to grant an heritable bond of corroboration, whereby the heir was cut off from getting relief of that debt out of the executry ; and persons on death-bed could not prejudice their heirs.

Fol. Dic. v. 1. p. 214. Forbes, p. 300.

*** Fountainhall reports the same case :

MR JOHN HAY, and Mr Robert Darling competing for the rents of some lands belonging to Humphrey Welsh, their debtor ;—Hay is infest on an heritable bond. Darling is an adjudger, who objects against Hay's right that it is null, being granted when he was *in lecto et agens in extremis*, and therefore signed by two notaries mentioning his sickness, and he died shortly after ; and as the heir might quarrel it, so can his creditors, as was found Balmerino *contra* Lady Couper, *voce* PROOF.—*Answered*, Ought to be repelled, because the heritable bond, though granted on death-bed, yet depended on an antecedent onerous cause, being only a corroboration of a prior bond for the same individual sum ; and though a creditor who had inhibited could reduce it, yet the heir can never be allowed to do so, because it depended on an onerous cause *ab ante*.

It is true, in the mutual relief betwixt the granter's heir and executor, it is competent for the heir to say, this debt cannot burden my heritage till the executry be exhausted, and it must, *primo loco*, affect the moveables; but *quoad* the creditor, both heir and executor, were equally liable to him.—THE LORDS considered such a bond would not subsist against an inhibitor, unless there had been a previous specific obligation to grant it, but that was not competent to the heir, where it was supported by a clear bond for onerous causes, and granted in *liege poustie*; and therefore preferred Hay, the annualrenter. There was likewise a nullity objected against Darling's adjudication, that it did not bear the executions of the special charge to have been produced; but they being now in the clerk's hands, the LORDS did not much regard this nullity; neither was it needful, seeing the preference stood on the first point.

Fountainball, v. 2. p. 482...

No 45.

1721. July. SIR JAMES FOWLIS of Colington against His SISTERS.

THE now deceased Sir James Fowlis of Colington, upon death-bed, granted to each of his two daughters, Elizabeth and Mary, bonds for the sum of 4000 merks, as their provision and portion natural; of which bonds the now Sir James Fowlis of Colington, son to the defunct, intended reduction upon the head of death-bed; and it was *pleaded* for him, That the law of death-bed extends to all deeds whereby the heritage can be evicted, 7th January 1624, Schaw *contra* Gray, No 32. p. 3208.; and 1st July 1637, Riddel *contra* Richardson, No 35. p. 3212.; where the LORDS repelled the allegiance, and sustained the reason of death-bed; for they found that a father could make no provision on death-bed in favours of his bairns, albeit unprovided, which might burden the heir with payment thereof; and that he could do nothing, but in so far as he might do in his own part, in law belonging to him, in so far as concerned his moveables: Which is a decision directly in the case.

The defenders *answered*; That the provision of children being *debitum natura*, bonds of provision granted in satisfaction of that debt, ought to be sustained, in so far as they are suitable to the condition of the children, and of the father's estate. The rule is; Wherever there is a preceding debt, a party on death-bed may grant a bond, or anailzie land: And the law has made distinction, whether the debt had its rise from any antecedent civil, or natural cause; both being equally binding upon the heir, who, by our law, would be obliged to aliment the younger children; as well as to pay debts contracted by bond or otherwise, to extraneous persons in *liege poustie*: And here the father, by granting the bonds of provision, has in effect done no more but regulated the fund of the aliment; which, when exorbitant, is subject to rectification of the judge, but if moderate, with respect to the circumstances of the estate and rank of the family, there can be no reason for the heir to reclaim, or allege that such pro-

No 46.

Bonds of provision on death-bed not sustained.

No 46.

visions were to his prejudice. And this is Lord Stair's opinion, l. 3. t. 4. § 29.; and a similar case to this was determined 23d February 1665, Jack *contra* Pollock, No 36. p. 3213. And as to the decision Riddel *contra* Richardson, it is *answered*, That the course of our law at that time was to allow no aliment to younger children, however necessitous, from the heir; which is otherwise now, according to the citation from Lord Stair, mentioned before. 'And now,' says that author, 'since the Lords have frequently decerned aliment for bairns against the father's heirs, having competent estates; it is like the Lords will allow all provisions on death-bed, in so far as they may be competent alimments.'

Replied for the pursuer; A father is bound to aliment his children till their majority, that they are capable to provide for themselves; deeds on death-bed will be sustained so far as that obligation of aliment reaches; and this is all Lord Stair says: But here the bonds craved to be reduced are not alimentary bonds; they are bonds which the father was not under any antecedent obligation to grant, and therefore cannot stand against the force of a reduction upon the head of death-bed.

'THE LORDS found the bonds reducible upon the head of death-bed.'

Fol. Dic. v. 1. p. 213. Rem. Dec. v. 1. No 27. p. 59.

1725. January 12.

WILLIAM M'KAY, and ELSPEETH his Wife, *against* THOMAS ROBERTSON.

No 47.

A bond secluding executors cannot be disposed of upon death-bed.

THOMAS ROBERTSON, merchant in Inverness, became debtor in a bond for 3000 merks, to William M'Wirrich and his heirs, *secluding executors*. John M'Wirrich, only son to the said William, made up a title to the bond, by serving heir in general to his father; and thereupon charged Robertson the debtor, who suspended. Thereafter upon death-bed, he conveyed this bond, by a testamentary deed, in favours of his mother, and William M'Kay her husband, the present pursuers; who being confirmed executors to the defunct, *insisted* against the debtor Robertson for discussing the suspension.—It was *objected*, 'That the pursuers had no sufficient active title by their confirmation as executors, the bond charged on being heritable, secluding executors:' To enforce which it was *pleaded*, *imo*, That formerly all bonds bearing annualrent were heritable, whether in the person of the original creditor or his heirs; and could only be transmitted by a service. The 32d act, Parl. 1661, declares all bonds bearing annualrent moveable, except in these cases following, viz. 'That they bear an express obligation to infest, or that they be conceived in favours of heirs and assignees, secluding executors; in either of which cases, ordains the sums to be heritable, and to pertain to the heir.' Here there is a general alteration of our ancient law with respect to bonds bearing annualrent, with an exception

from that alteration ; so that in the cases excepted, the former law continues in its full vigour as if no alteration had been made ; and therefore it clearly follows, that bonds secluding executors are simply heritable, without regard in whose person they exist, equally as bonds with clauses of infeftment ; *2do*, In this bond there is a destination of succession, *sciz.* to the creditor's heirs, secluding his executors ; for it is not conceived to the creditor and his heir, but to the creditor and his heirs ; and therefore, till this destination be altered in a legal way, the bond for ever must descend from one heir to another, because *hæres hæredis mei, est hæres meus*. But this alteration could not be made upon death-bed, or by way of testament ; in both which views the pursuers, as executors confirmed to the defunct, can have no right to this bond.

Answered to the first, A bond secluding executors, though it go to the heir, not to the executor, is not for that reason in its nature heritable ; for these questions are perfectly distinct, ' What rights are in themselves heritable and moveable ? And what go to heirs in opposition to executors ? ' This last is a *quæstio voluntatis* ; the other independent of any man's will ; for though a proprietor has it in his power to make his rights descend from him in any channel he pleases, he has no power to alter the legal essence and nature of them. Thus then, as bonds bearing annualrent are made simply moveable after the act 1661, they cease not to be so, though having clauses secluding executors ; and when the act mentions bonds secluding executors as an exception, it is not with an intention to continue them simply in their nature heritable, but only to make them pass to the heir, according to the destination of the creditor. Hence it is that a bond secluding executors, though it would go to the creditor's heir by virtue of that clause, yet if the creditor assign the bond, it goes to the assignee's executor by virtue of the legal succession, unless the contrary be expressed ; which is a demonstration, that it is in its nature, and by the law, moveable ; for did it continue heritable, as before the act, it would infallibly go to the assignee's heir, as bonds bearing annualrent did before that time. To the *second, answered*, That this bond was indeed heritable in the person of the first creditor *destinatione* ; but having devolved into the person of a successor by service, it became moveable, so as to fall to the heir's executors. The reason is, that when a moveable sum, contrary to its nature, is made *destinatione* heritable, that destination not being intended as a continued tailzie to heirs, but only a provision for the first heir of the creditor ; the destination coming to be satisfied by an heir once existing, the sum thereafter returns to its proper nature of a moveable subject. But granting even such a destination to heirs, as is contended for, the pursuers title falls notwithstanding to be sustained ; for where a subject, in itself moveable, the case of bonds bearing annualrent, comes to be tailzied to heirs, it ceases not to be moveable in its nature, and therefore capable to be disposed of in testament and upon death-bed. Thus a bond granted to a creditor, ' which failing, to Titius ; which failing, to Mævius, ' &c. will as effectually exclude the executors, as a bond expressly excluding them ; and the

- No 47. right too must be made up in the person of the substitutes by a service ; and yet the creditor, or any of the substitutes, may dispose of such bond by way of testament. Neither is it in law considered as any other way heritable, but as to the form of establishing the title ; and why it ought not to be so likewise in bonds secluding executors, when once come in the person of the successor, no solid reason can be given ; for as Sir James Stewart observes, *voce* BOND HERITABLE, p. 17, *versus finem*, ‘ There is a great difference betwixt *heritable* and ‘ *moveable*, and *testible* and *intestible* ; and some subjects may befall to the heir, ‘ and be carried too by service, and yet the creditor or the substitute may test ‘ upon the same.’

Replied for the defender ; Were it even true, which will not be allowed, that bonds secluding executors, are in their nature moveable, and consequently conveyable by testament ; the pursuers will still be cut off by the law of death-bed. For if any moveable subject by a tailzie be appointed to go to heirs, the proprietor upon death-bed, has no more power over this moveable subject, than if heritable ; because in no case can a man prejudice his heir upon death-bed ; and this the pursuers will never get over. See February 1722, Maxwell *contra* Neilson of Barncailly, No 13. p. 3194:

‘ THE LORDS sustained the objection.’

Fol. Dic. v. 1. p. 213. Rem. Dec. v. 1. No 53. p. 163.

- No 48. 1727. January 26. ADAMS against THOMSON.

A WOMAN upon death-bed granted a disposition to one of her sisters, excluding another who had a right to come in as heir portioner.—THE LORDS repelled the allegiance, that the alienation was *intra familiam*, and found the reduction on the head of death-bed relevant. See APPENDIX.

Fol. Dic. v. 1. p. 213.

- No 49. 1733. December. CHRYSTISONS against KER..

A TACK for three nineteen years of the granter's whole estate done on death-bed, though alleged to be for an adequate rent, was reduced ; it being *pleaded*, That though a tack for a moderate endurance, granted upon death-bed, may subsist, as being an act of ordinary administration, a tack for three nineteen years is a *species* of alienation which cannot be granted upon death-bed. See APPENDIX.—TACK.

Fol. Dic. v. 1. p. 115.

1736. July 14.

The CREDITORS of SIR PATRICK STRACHAN of Glenkindy *against* CHARLES BALDWIN, Esquire.

SIR PATRICK STRACHAN, on death-bed, executed a marriage-contract, whereby he granted an annuity of L. 100 Sterling per annum, out of his estate, in which he was infest, to Elizabeth Auldgood his wife, with whom he had been married for several years; and, on the other hand, the Lady therein disposed to him a small estate she had in England, renouncing likewise in his favours, her paraphernalia, jewels, &c. It was further *provided*, That, in case she happened to succeed to any friend in an estate of a hundred pounds a year, the jointure was to go to her own children; and on this contract she was infest.

Upon Sir Patrick's death, the Lady married Mr Baldwin, who, during the marriage, commenced a process of poinding the ground, for recovering her annuity; which he insisted in after her death, as having right to the bygoness *jure mariti*.

But Sir Patrick's creditors, who adjudged the estate from his apparent heir, brought a reduction of the Lady's provision, as granted on death bed; against whom it was *pleaded* for Mr Baldwin, *imo*, That, as the heir could have no title to insist in the objection of death-bed, seeing he would have been excluded by the debts, which exhausted the estate (although the annuity had not been granted); therefore it was not competent to the Creditors, who came in his right, to plead it. *2do*, Supposing they had a title, yet, as the provision was in favours of a wife, it could not be said to be in prejudice of the heir; seeing it was both onerous and rational, founded not only on the antecedent obligation which lay upon the husband to provide for her, but likewise upon the onerous prestations on her part, which are, *per se*, a sufficient defence against death-bed; as it has been found, That an heritable bond of corroboration of a moveable debt is not reduceable *ex capite lecti*, 18th January 1709, Darling against Hay, No 45. p. 3222. Nay, the marriage itself was an onerous cause for granting the annuity; in consequence whereof it follows, that a jointure given after marriage is not reckoned a donation, but onerous, and therefore not revokeable; or, abstracting from the onerosity of the deed, the natural obligation upon a husband to provide a wife is sufficient to support the annuity. It is true, provisions to children fall under the law; but there is a great difference betwixt the two cases; for, with regard to the first, there is both an antecedent natural obligation and onerous cause, *scil.* The marriage for supporting the provision to a wife; whereas, it is doubtful if there is any natural obligation to provide children; and, for certain, there is no antecedent onerous cause.

But, *3tio*, A jointure, in such a case as this, where the husband was infest, and consequently the wife entitled by law to a terce, can never get the name of a deed in prejudice of the heir, if the provision did not exceed a *rationabilis*

No 50.

A person on death-bed executed a marriage contract, granting an annuity out of his estate to his wife. Having died insolvent, his creditors in right of the heir, challenged the deed *capite lecti*. Found that the annuity was ineffectual, in so far as it could affect the fee of the estate.

No 50.

tertia; for it is no prejudice to the heir to change the form of the wife's jointure, from that of a terce to a voluntary provision; on the contrary, this annuity might have proved an advantage to Sir Patrick's heir, since it was only to subsist until she succeeded to L. 100 a-year, of which she had then a prospect, by the death of a near relation. And, in questions where a jointure has been quarrelled, as granted without suitable powers, if there might been a terce competent to the wife, the voluntary provision has been sustained to the extent of a *rationabilis tertia*; as in the case betwixt Mrs Borthwick, widow of Hartside, and Borthwick of Crookston. See HUSBAND and WIFE.

Replied for the Creditors; It is an established point, That a man on death-bed can do no deed whatsoever to the prejudice of his heir; and, as it would have been competent to him to reduce the liferent, it is equally so to the creditors, who have denuded him by their diligence. Nor does it make any alteration, whether the estate is exhausted by other debts or not; seeing every deed, by which it is burdened or alienated, is certainly prejudicial to the heir, who is entitled to his predecessor's estate free of that burden, and to detain it upon paying or transacting the debts contracted in *liege poustie*; so that the donee, by the death-bed deed, is not concerned, whether the reversion that falls to the heir be more or less.

In the *second* place, As Sir Patrick knew he was *obærat*, and that his estate was not sufficient to answer his debts, it was directly *in fraudem creditorum* for him to give such an exorbitant provision out of his estate, which does not exceed 3000 merks a-year; so that, *esto* it had been granted in *liege poustie*, it was reducible upon the act 1621; for this is not like the case where a contract is entered into before marriage, which is supported by the marriage following upon the faith of it, and where the Lady is presumed ignorant of her future spouse's circumstances. But here this simulate contract is entered into several years after the marriage, when the Lady cannot be supposed ignorant of her husband's situation; and, in so far was *particeps fraudis* in taking any security from him beyond what the law gave her a right to; but there is no occasion here to enter upon such an argument, as this reason of reduction is so plainly founded in law, and which admits of no exception upon account of the rationality of the deed; in so much, that bonds of provision by a father to his children, which are as rational as any provision to a wife, if not more so, as the law secures her in a terce, are reducible *ex capite lecti*; so it was decided July 1721, Sir James Fowles, No 46. p. 3223.

Neither does the onerosity of a deed exeem it from this objection; for what is more onerous than a sale? Yet it is void when executed on death-bed: *Nemo potest hæreditatem vendere in lecto ægritudinis*, says the law of Majesty; agreeable to which, it was adjudged July 1635, Richardson, No 34. p. 3210. As to the decision in the case of Darling, the *ratio decidendi* there was, That the heir had no prejudice by the deed; how far this was a good reason, the pur-

suers have no occasion at present to enquire, or to enter upon these general topics, as there was here no onerous cause for granting the provision; for the conveyance of the English estate, by the Lady to Sir Patrick, was no more than a *color quasitus* to make the appearance of onerosity, as it does not appear that she had any right to it herself.

As to the *third* observation, That the liferent ought to be sustained, at least to the extent of a terce, it falls to be observed, that there is a very wide difference between these two rights, a terce being no more than a right to the fruits; whereas an infeftment of annuity affects the fee. And, although the Lady might have insisted upon her terce, either against the tenants or intrumitters with the rents, as may the defender her assignee; yet he cannot, in virtue of the terce, affect the fee of the estate, for rents which she ought to have uplifted during her own lifetime. Nor is there any ground to support the annuity as a security for the terce, as if the heir and creditors had no harm by it; seeing their prejudice is manifest, if a right to the rents is turned into a burden upon the property, and the relict gets liberty to ly still and allow the rents to be run away with, which she had a title to uplift, and thereafter to come and be ranked on the fee to the exclusion of creditors. But it is plain, a person on death-bed has no power to make such a transmutation of right to the prejudice of his heir or creditors.

And, with regard to the clause declaring, That the jointure should cease in case she succeeded to L. 100 Sterling a-year, it is *answered*, That, if one in such circumstances cannot make the plainest bargains for his heir, much less can he make bargains of chance. Besides, even in that event, the Lady was only to give down her liferent to her own children, but still it was kept up against the creditors; so that that clause does not appear to concern the present question.

THE LORDS sustained the reason of reduction, in so far as the annuity could affect the fee of the estate.

C. Home, No 30. p. 58.

1747: December 17.

LESLIE against LESLIES.

No 51.

It is laid down in our law-books, That bonds of provision to younger children are reducible upon the head of death-bed, however rational and moderate: And so it was here adjudged; the bonds of provision were reduced *ex capite lecti*, and the defence, that they were rational and moderate, repelled.

Fol. Dic. v. 3. p. 171. Kilkerran, (DEATH-BED.) No 6. p. 154.

No 52.

A father cannot on death-bed, vary a nomination of curators made in *liege poustie*.

1751. February. CRAWFURD against JOHNSTON and Others.

FOUND, That as a father cannot name curators to his children on death-bed, so neither can he on death-bed vary a nomination, which he had made in *liege poustie*, by a new nomination, only a part of those formerly named; though he might have thrown the former nomination into the fire.

Fol. Dic. v. 3. p. 171. Kilkerran, (DEATH-BED.) No 7. p. 154.

1757. February 25.

AGNES LOGAN and her CHILDREN against ANDREW CAMPBELL.

No 53.

Found, that provisions to younger children, even moderate and rational, were challengeable by the heir if granted on death bed.

PROVISIONS to younger children extremely moderate and rational, being granted on death-bed, the tutors to the heir thought it their duty, much against their inclination, to challenge the same. According to the late practice of the Court of Session, with respect to younger children unprovided, of modifying such aliment as to afford some stock out of the savings, it was made appear, that the heir was really at no loss by the provisions granted to the younger children in this case. The case was so clamant that it produced a hearing in presence. Humanity and equity pleaded for the provisions. But the current of decisions lay the other way. Without gathering all that was said on either side, it will give more satisfaction to follow out one train of reasoning. The argument for the heir was very simple, that he cannot be hurt by any deed done by his predecessor on death-bed. The argument for the younger children, in the best light I can put it, is what follows:

To draw the attention of the reader, I must premise that this point is of greater consequence than one at first is apt to imagine. So averse are men to think of death, that an ultimate settlement of their affairs is generally postponed from time to time without end. Daily instances accordingly of children left unprovided, or provided no sooner than on death-bed. The greater the fortune, the greater chance for such event; persons in opulent circumstances having generally a peculiar aversion to death.

The law of death-bed, as set forth in the statutes of King William, cap. 13. goes no further than to prohibit gratuitous alienations of land on death-bed. And this is made more plain in Reg. Mag. L. 2. cap. 18. § 7. &c. There it is laid down, that in *liege poustie* a man may gift a reasonable or moderate portion of land to whom he pleaseth. But that he cannot do this on death-bed; for, says the law, 'Where a man in deadly sickness maketh an alienation, which in health he did not think of; the same is presumed to be done through trouble of mind, and not deliberately, nor by good advice.'

So strictly has this law been interpreted, that even in more recent times the doubt was stirred, whether the law of death-bed strikes against the alienation of an heritable bond which is not completed by infestment. It was *urged*, That our ancient law-books talk of *terræ et tenementa* only. The plurality, however, moved by the reason of the law just now mentioned, were of opinion that this case falls under the law of death-bed; 16th January 1581, Dickson, No 27. p. 3205.

Admitting, then, that the prohibition to alien on death-bed extends to all heritable subjects as well as land, it is clear that there are no words in the law which prohibit a man on death-bed to contract debt, whether onerous or gratuitous; for alienating a man's property, and contracting debt upon it, are very different acts. The power of borrowing money upon death-bed was never disputed. And whatever objection may lie against a gratuitous bond granted in that situation, the objection plainly does not arise from the words of the law. This observation demands peculiar attention, because great weight will be laid on it.

A law founded on utility, and which promotes the common interest, may no doubt be extended beyond the words, to fulfil the purpose of the legislature. And, therefore, whether the law of death-bed ought to be so far extended by a court of equity as to annul bonds of provision to children, is the precise question that remains to be discussed.

That the law of death-bed ought to be extended against bonds merely gratuitous, seems pretty obvious. For a law, prohibiting alienation upon death-bed, as far as prejudicial to the heir, could never intend to lay the estate open to be swallowed up by gratuitous bonds. And indeed, were this permitted, the law of death-bed would avail very little. A bond, merely voluntary or gratuitous, granted on death-bed, will be presumed, in terms of the law, not to have been done deliberately or by good advice. It will be presumed to be either the effect of undue influence upon a man in trouble of mind, or of an unjust purpose to defraud the heir; and in either view it ought to be annulled.

A bond granted upon a rational consideration is in a very different condition. It admits not of either of the two presumptions now mentioned. Its rationality, which is a just motive for granting, excludes both. There can lie no presumption that it was elicited by undue influence; and as little that it was done to defraud the heir. I give for an example, a bond for 10, 20, or 30 pounds, given in remuneration to an old servant who has done faithful duty to his master, in peace and war, in health and sickness, for many years. I cannot find the slightest foundation in the spirit of the law of death-bed, more than in the words, to cut down this deed.

And this leads directly to the case in hand. A bond of provision which is immoderate, and beyond the circumstances of the granter, ought to be cut down; because it either has been elicited by undue influence, or must have been intended to the heir's prejudice. But a moderate bond of provision cannot admit of either of these presumptions. It has a most rational motive, not only

No 53. humanity and parental affection, but even parental duty ; for he that provideth not for his family is worse than an infidel.

A separate consideration may be added, peculiar to a bond of provision granted to children. With what countenance can it be pleaded, that such a bond, when moderate, is prejudicial to the heir ? Upon any principle of humanity or justice it assuredly is not so. And indeed it must raise one's indignation to hear it coolly maintained, that the heir, who succeeds to all, suffers a prejudice by being burdened with moderate provisions to his brothers and sisters ; when without such provisions they would be abandoned to all the bitterness of want.

A man on death-bed can grant an heritable bond of corroboration, and can, by a charge of horning, convert an heritable to a moveable debt. Every step of this kind is indirectly providing for his younger children. What justice, or what sense, can there be in prohibiting him to provide for them directly.

Upon this subject I must observe historically, that our law formerly, directed by the general bias of the nation, was out of all measure favourable to the heir ; and through the same bias the law of death-bed was undoubtedly stretched too far. This not only accounts for our old decisions upon this head, but is also a reason for an alteration. Our manners and customs are changed : Commerce and manufactures employ those whose best occupation formerly was idleness, as they were frequently occupied in broils and civil dissensions : Our younger children have thus become the riches of our country, and, in opposition to the heir, ought now to be the favourites of law.

An argument was urged from the bad consequences of exposing persons on death-bed to undue solicitation. And indeed the argument is weighty with respect to the moveable estate, which, without limitation, can be aliened, not only upon death-bed, but even *in extremis*. But as for provisions to younger children, supposing them moderate, I cannot discover any bad consequence. No solicitation can be wrong which is confined to an end so rational. And if there be any excess in such provisions, it is subjected to the modification of the Court ; which a settlement of moveables is not, however whimsical or irrational.

It was agreed on all hands that the provisions were moderate. Yet a great plurality voted against the provisions, influenced by practice and the course of decisions, without piercing deeper.

Sel. Dec. No 126. p. 178.

No 54.

A father cannot, on death-bed, grant bonds of provision to younger children, to the prejudice of the heir.

1757. November 15.

YOUNGER CHILDREN of HUGH CAMPBELL, against His ELDEST SON.

HUGH CAMPBELL purchased the lands of Pencloe, of 600 merks yearly rent, from his brother Andrew, for 17,600 merks : He paid the price, and received a disposition ; but no infeftment followed. This purchase exhausted all the fortune he had.

Six months after, Hugh being on death-bed, and seeing that he had no other fund for provisions to his younger children, cancelled the disposition; took an obligation from Andrew to sell the lands for behoof of Hugh and his heirs, and granted reasonable bonds of provision to his younger children, to be paid out of the price of the lands.

The tutors of the heir having quarrelled this transaction on the head of death-bed, the LORDS, abstracting from the circumstances of the case, ordered a hearing at the bar upon this general point, Whether a man could, upon death-bed, grant rational provisions to his younger children, so as to affect the land estate descending to the heir?

Pleaded for the heir; The words of the *Regiam Majestatem*, lib. 2. cap. 18. entituled, *De donationibus terrarum*, § 7. & 9. are, "Licet autem, generaliter, cuilibet liceat de terra sua rationabilem partem, pro voluntate sua, cuicunque voluerit, in vita sua donare; in extremis tamen agentis, hoc nulli hactenus est permissum.—Unde præsumeretur, quod si quis in infirmitate positus quasi ad mortem, terram suam distribuere cœperit; quod in sanitate facere noluit, hoc potius ex fervore animi, quam ex mentis deliberatione, eveniret." And the words of the laws of William the Lion, cap. 13. are, "Nullus post, in lecto ægitudinis suæ de qua moritur, alienare aliquas terras quas hæreditarie possidet, in comitatu vel in burgo; nec etiam aliquas terras quas acquisivit in sanitate sua; nec alicui dare aut vendere ab hærede suo, nisi forte ære alieno sit oneratus; propter quod, de necessitate, ipsum oporteat terras vendere vel impignorare; communiter enim dicitur, Quod necessitas non habet legem; ubi hæres ejus nec potest, nec vult, eum de suo debito relevare."

Originally it was the law of almost all nations, That not man, but God only could make an heir; and hence it was our most ancient law, That even in *liege poustie* a man could not dispose of his heritage. Afterwards, indeed, this came to be altered, and he was allowed to dispose in *liege poustie*; but still he was incapacitated to hurt his heir upon death-bed. The principles, therefore, on which the law of death-bed is founded are, the remains of the ancient favour to the heir, the supposed incapacity of a dying man to judge aright of settlements, and the danger of dying persons being teased in their last moments by those around them.

As such is the precise rule of the common law, laid down in the *Regiam Majestatem*, and of the statute law, laid down in the law of William the Lion, and as that rule has not been altered by any subsequent statute, it is not in the power of the Court of Session to infringe upon it. The Court is to apply the law, not to make the law. The Court of Session has not pretorian powers. The pretor was a magistrate as well as a judge, who derived his power immediately from the people, and succeeded the consuls in their judicative power; as they again succeeded the kings in that part of their regal office. This account of the origin of the office, gives the reason why the pretor not only acted the part of magistrate and judge, but of lawgiver, giving out laws under the name

No 54. of *edicts*, according to which he administered justice. The judicial part he committed, in ordinary cases, to certain judges under him, called *judices pedanii*, who were judges, and nothing more ; and therefore had not the power of executing their own sentences, which were executed by the magistrate who named them. These were the proper judges known to the Romans ; and that part of the trial which was carried on before them, was only, in their language, called *judicium*. This was the power of the Roman pretor. On the other hand, the Judges of the Court of Session are not magistrates, but judges, having a delegated power from the chief magistrate of the country ; and who himself, by our constitution, hath not the power of suspending or dispensing with the laws, much less of abrogating them. And even the sentences pronounced by them they cannot execute ; but, like the sentences of those judges just mentioned among the Romans, they are executed in the name of the king, or chief magistrate, from whom the Court derives its authority. And although, like those judges, the Court does not judge under the restraint of a *formula* in every particular case, yet it has a general *formula*, namely, the law of the country, from which it cannot in any case depart. Even the Roman pretor, great as his power was, did not take upon him directly to abrogate the established laws ; but, on the contrary, treated them with the greatest caution and respect, rather eluding, and breaking the force of them, by circuits and devices, than directly repealing them ; nor can any example be given, where the pretor went so directly in opposition to the established law, as it is proposed the Court of Session should do in this case.

Answered for the Younger Children ; The words of the two laws bar only gratuitous alienations to the prejudice of the heir, but not rational deeds to his prejudice. The chapter of the *Regiam Majestatem* founded upon, is entituled expressly, *De donationibus terrarum* ; but then a law founded on utility, and which promotes the common interest, may be extended beyond the words, to fulfil the purpose of the legislature ; and the judgment may fall to be pronounced in equity, and not in strict law. In this view, the present question is, Whether the law of death-bed ought to be so far extended by a Court of Equity, as to annul a bond of provision granted by a man upon death-bed ?

When the principles of equity are applied, they will be found to vary with the merits of the bonds. That the law of death-bed ought to be extended against bonds merely gratuitous, seems obvious ; for a law prohibiting alienation upon death-bed, so far as prejudicial to the heir, could never intend to lay the estate open to be swallowed up by a gratuitous bond ; and indeed, were this permitted, the law of death-bed would avail very little. A bond merely voluntary, or gratuitous, granted on death-bed, will not be presumed, in terms of the law, to be done deliberately, or by good advice : It will be presumed to be either the effect of undue influence upon a man in trouble of mind, or of an unjust purpose, to defraud the heir ; and, in either view, it ought to be annulled.

A bond granted on a rational consideration, is in a very different situation. It admits not of either of the two presumptions now mentioned. Its rationality, which is a just motive for granting it, excludes them both. There can lie no presumption, that it was elicited by undue influence, and as little that it was done to defraud the heir. There is not the slightest foundation in the spirit of the law of death-bed, more than in the words, to cut down such a deed.

Thus a bond of provision, which is immoderate, and beyond the circumstances of the granter, ought to be cut down; because it either has been elicited by undue influence, or must have been intended to the heir's prejudice. But a moderate bond of provision cannot admit of either of these presumptions: It has a most rational motive; not only humanity and parental affection, but even parental duty; for he that provideth not for his family, is worse than an infidel.

This doctrine takes off the force of the argument drawn from the danger of mens doing irrational deeds when they are incapable of judging for themselves. The authority of the Court is asked to support rational, and not irrational bonds of provision.

It takes off too the force of the argument drawn from the danger of dying persons being teased to execute settlements. It will require little teasing, to get a man to grant rational bonds of provision to his children; and it cannot be called undue influence, to ask a man to do what he ought to do.

It takes off too the force of the argument, that the Court have no power to support such bonds, even though they thought it right to do it. The Court of Session is either a court of strict law, or a court of equity. If it is the former, it cannot cut down rational bonds of provision; because, not being gratuitous alienations of land, they are not within the strict letter of the law of death-bed: If it is the latter, it would appear to be the province of the Court, to beat down bonds of provision when they are exorbitant, and contrary to equity, but to support them when they are moderate, and according to it.

THE LORDS found, That the father could not grant the provisions in question to his younger children upon death bed.'

For Heir, *Burnett, Advocatus, Ferguson.*

Alt. *Jr. Dalrymple, Miller, Lockhart.*

J. D.

Fol. Dic. v. 3. p. 171. Fac. Col. No 55. p. 88.

* * This seems to be the same case with Logan against Campbell, No 53. *supra*.

1759. June 19. JOHN BOGLE of Hutcheson, against DAVID BOGLE.

JOHN BOGLE was proprietor of the two merk lands of Hutcheson; which, in his contract of marriage, he provided to himself, and the heirs of the marriage; whom failing, to his own heirs whatsoever. Of that marriage he had three sons; William, Thomas, and David.

Upon the marriage of William the eldest son, John the father disposed to him the one half, *pro indiviso*, of the foresaid tenement. The father and son

No 55.
The Lords found, that the law of death-bed extended to tacks; and, at the instance of the heir, reduced

No 55.
a tack of 38
years endurance,
granted for an under-
rent, by a
father on
death-bed to
a younger
son.

afterwards possessed each a half of the lands, in a kind of run-rig, for many years, till William let his half to John Reid; and soon after died, leaving a son, John, and several other children.

When old John was in the 74th year of his age, and after contracting the disease of which he died, a tack was executed between him and his youngest son David; whereby he let, for the space of 38 years, the half of the lands which had remained in his natural possession, to David, and the heirs of his body; whom failing, to his other son Thomas, and his heirs and assignees; reserving to himself and his wife the liferent of the dwelling-house and yard. On the other part, David and Thomas were taken bound to pay to their father and his heirs, L. 100 Scots of yearly rent, together with the public burdens, effieiring to the half of the lands of Hutcheson.

John, the granter of the tack, died within fourteen days after its date; and was succeeded in the property of the said half of the lands contained in the tack, by John his grandson, then a minor; who, upon his coming of age, brought a reduction against his uncle David, of the said tack, on the head of death-bed; and the circumstances of the granter at the time were clearly proved as above mentioned.

Pleaded by the defender; That it is only alienations of heritable subjects which are reducible *ex capite lecti*, and where the heir can qualify lesion from such deeds; whereas tacks, such as this, being onerous, and acts of ordinary administration, may be lawfully and effectually executed at any time of the granter's life, while he retains a sound judgment.

Answered for the pursuer; The law of deathbed was introduced to preserve the succession to the right heirs; and to this day takes place in the smallest as well as the greatest heritage. It strikes against not only direct alienations, but every device or measure calculated for creating an incumbrance on the heritage prejudicial to the heir. It is admitted, that the proprietor of an estate must, for public utility, retain the administration of it *usque ad supremum vitæ balitum*; but this tack was not a necessary or common act of administration, but a device to create a burden on the heir in favour of the granter's younger children. For, *1mo*, It is granted for a rent below the true value of the ground. *2do*, It is of an uncommon endurance. *3tio*, It comprehends the mansion-house and yard of this ancient though inconsiderable family. *4to*, By the intermixed possession of the lands, the heir cannot let or sell his remaining half to advantage, while the other half is under this lease. And, *5to*, The substitution of one son after another is uncommon, and carries the appearance of a deed of provision by the father for the benefit of his two younger sons. The reduction of such a tack on the head of deathbed is therefore not an extension of that law, but agreeable to the reason and intendment of it, and to the analogy of many decisions; particularly, December 1733, Chrystisons *contra* Kerr, No 49. p. 3226; and 15th November 1757, Children of Hugh Campbell, No 54. p. 3232.

Replied for the defender, 1^{mo}, The tack is granted for an adequate rent, as it is equal to what Reid paid for the other half of the lands, or very little short of it. 2^{do}, Experience hath proved the inconveniency, both to master and tenant, of limiting tacks to a short period of time; and the utmost length the objection to this tack's endurance could go, would be to restrict it to such a shorter period as might be thought proper. 3^{tio}, There is properly no mansion-house on either half of the lands, but only an onstead for each farm; and the pursuer may, if he pleases, have his choice of the two. 4^{to}, The two halves of the lands have been always possessed as separate farms: so the inconveniency is not greater than formerly; and could not be remedied by this reduction, as both lie run-rig with other grounds. And, 5^{to}, The substitution of Thomas, the granter's other son, cannot affect this tack, more than if it had been granted in such terms to perfect strangers. Nor does the decision, *Chrystisons contra Kerr*, which is a single one, apply to this case; as there the tack was given on deathbed of the whole of the granter's estate for three nineteen years, which was considered as a species of alienation.

'THE LORDS reduced the tack; and decerned.'

Act. *Miller*.

Alt. *Jo. Dalrymple, Lockhart*.

Clerk, *Pringle*.

Fol. Dic. v. 3. p. 171. Fac. Col. No. 187. p. 334.

1797: December 5.

MARGARET and AMELIA MURRAY, against The TRUSTEES of MARGARET BORTHWICK.

JOHN SCHAW died on the 1st September 1770, leaving a widow, Margaret Borthwick, and two daughters, Janet, married to William Murray, and Margaret, the wife of Dr James Feild.

In 1769, John Schaw had executed a trust-settlement, by which he left his wife L. 2000, and the liferent of the greatest part of the remainder of his property. He also left L. 1500 to his grand-children by each of his daughters, payable at his wife's death.

These legacies were qualified by the following clause: 'Reserving always full power to the said Margaret Borthwick, my spouse, at any time of her life, after my decease, by a writing under her hand, to revoke and alter the provisions hereby conceived in favour of my saids grandchildren, or otherwise to divide and proportion the same amongst them, in the same manner, and as freely in all respects as I could have done myself, if in life.'

The deed further provided, that 'upon the decease of the said Margaret Borthwick, my spouse, I do hereby appoint the whole free residue of my estate, real and personal, which shall then remain, after payment and satisfaction of my debts, funeral-charges and expenses, and after deduction of the aforesaid L. 2000 Sterling provided to my said spouse, in case she shall have disposed thereof by a writing under her hand; as also after payment of any

Bonds secluding executors fall under the law of death-bed.

No 56. ' legacies or donations, which I may hereafter think fit to bequeath to any of
 ' my friends or relations ; and the aforesaid provisions to my daughters or
 ' grandchildren, before named, to be divided into two equal shares ; the one
 ' just and equal half thereof, I do hereby assign and dispoſe, to and in favour
 ' of the ſaid Janet Schaw, my eldeſt daughter ; and the other juſt and equal
 ' half thereof, to and in favour of the ſaid Margaret Schaw, my other daugh-
 ' ter, and their reſpective heirs and aſſignees ; and which diſiſion between my
 ' ſaid daughters ſhall be made at the term of Whitsunday or Martinmas next
 ' and immediately following the deceaſe of my ſaid ſpouſe, by two neutral
 ' perſons, one to be choſen by each of my ſaid daughters, or their heirs.'

John Schaw, on the 27th Auguſt 1770, when on deathbed, executed a ſub-
 ſequent deed, by which, after referring to his former ſettlement, he declares,
 ' That ' in place of an equal diſiſion betwixt my ſaid two daughters of the reſi-
 ' due of my means and eſtate, as is appointed by my ſaid diſpoſition and ſet-
 ' tlement, it now is my will and intention that the ſaid Margaret Borthwick,
 ' my ſpouſe, if ſhe ſurvive me, ſhall have the ſole power of dividing the ſaid
 ' reſidue betwixt my ſaid two daughters, or amongſt them and their children,
 ' as ſhe ſhall think proper ; therefore, and in virtue of the ſaid reſerved power,
 ' I do hereby, but in ſo far only as regards the diſiſion of the ſaid reſidue, re-
 ' voke and alter the ſaid diſpoſition and ſettlement ; and do hereby declare,
 ' that it ſhall be in the power of the ſaid Margaret Borthwick, my ſpouſe, in
 ' the event of her ſurviving me, to divide the reſidue of the ſaid means and e-
 ' ſtate, which ſhall remain at her deceaſe, after payment and ſatisfaction of my
 ' debts and funeral charges, and of the other debts and burdens mentioned in
 ' the ſaid diſpoſition and ſettlement, betwixt my ſaid two daughters, or a-
 ' mongſt them and their children, by ſuch ſhares and proportions as ſhe ſhall
 ' think proper, and payable to them at ſuch times or terms as ſhe ſhall think
 ' fit.'

At Mr Schaw's death, almoſt all his fortune was lent out, on bonds ſeclud-
 ing executors.

Mrs Schaw ſurvived her husband twenty-four years, in the courſe of which
 ſhe received payment of the greater part of the bonds, and again lent the mo-
 ney, along with ſums belonging to herſelf, and took bonds for the whole, pay-
 able to herſelf, *proprio jure*.

In 1791, Mrs Schaw executed a truſt-ſettlement, by which ſhe left the
 whole of her own fortune to her daughter Margaret, and her family ; and, in
 virtue of her power of diſtribution by the deed made by her husband in 1770,
 ſhe likewiſe ordered the reſidue of Mr Schaw's fortune, after paying his debts
 and legacies, amounting to L. 3746 : 14 : 6½, to be divided in the following
 proportions, namely, L. 2946 : 14 : 6½, to her daughter Margaret, and her fa-
 mily, and the remaining L. 800 to her grandchildren, and great grandchildren
 by Janet, who had died before the date of the ſettlement. She further or-

dered the special legacies of L. 1500, left by her husband to the families of each of the daughters, to be paid precisely in terms of his settlement.

Considerable losses having been sustained on the bonds which Mrs Schaw had taken in her own name, it was by her settlement declared, that 'although in justice I might state and get allowance of the losses which have already fallen upon my husband's funds; yet it is my resolution, that the same shall be sustained proportionally by his funds and my own, and therefore, I do hereby direct my trustees before named, and survivors or survivor of them accepting, that after my death, upon casting up the whole losses which have been sustained, a proportional deduction shall be made from the estates both of my husband and myself, so that the losses may fall equal upon both; and I direct that the different sums payable to my grand-children, or great-grand-children, shall suffer a proportional abatement.'

Margaret and Amelia Murrays, children of Janet Schaw, conceived that they had right to a greater share of their grandfather's succession, than was given them by his widow's settlement, on two grounds: 1st, Because, as John Schaw's funds consisted chiefly of bonds heritable *destinatione*, he could not by his death-bed deed in 1770, give his widow the power of dividing the residue of his estate, to the prejudice of his heirs at law; 2dly, Because his widow had no right to burden her husband's funds, with losses arising on bonds payable to herself, *proprio jure*. They accordingly brought a reduction of Mr Schaw's death-bed settlement, and of Mrs Schaw's trust deed, to the effect of setting them aside in these particulars.

In defence, Mrs Schaw's trustees

Pleaded, 1st, It is doubtful if the law of death-bed applies to bonds secluding executors, which are heritable merely *destinatione*, and have no connection with land or real property.

At all events, Mrs Schaw, by her husband's first settlement, made in *liege pousie*, had the faculty of distributing or revoking the special legacy of L. 1500, left to the pursuers, and she certainly would have exerted it, had she known her want of power to distribute the residue of his fortune in virtue of his last deed. By her present settlement, the pursuers get L. 2300, but she might have cut them off from every thing, but the half of the free residue of her husband's funds, which amounts only to L. 1873 : 7 : 3. Her settlement must therefore be held in law to have the same effect, as if she had declared in general terms, that the pursuers should not draw more than L. 2300 from their grandfather's succession, which was unquestionably within her power.

2dly, Mrs Schaw, by her husband's settlement, had express powers to receive payment of her husband's bonds, 'and of new, to lend out and re-employ the same.' And as the debtors, at the time she made the loans, were habite and repute responsible, she was clearly entitled to deduction of the loss which afterwards arose from their insolvency.

No 56.

Answered, 1st, Bonds secluding executors fall clearly under the law of death-bed; Erskine, b. 3. tit. 8. § 20.; Bankton, b. 3. tit. 4. § 34.; 12th January 1725, M'Kay against Robertson, No 47. p. 3224.

There is no evidence that Mrs Schaw, had she known her disability to dispose of the residue of her husband's funds, would have deprived the pursuers of their special legacy; and were courts of law to give effect to conjectures with regard to what parties might have done, had they properly conceived their situation, it would lead to much injustice and endless litigation.

2dly, A person lending trust funds, should take the bonds payable to him in his character of trustee. Where bonds are payable to himself *proprio nomine*, the presumption of law is, that the money belongs to himself, and no loss which arises on them can affect the trust estate.

' THE LORDS, (30th November 1796,) found, That the deceased Mr Schaw, when upon death-bed, had no power to execute the deed, 27th August 1770, and therein to revoke the equal division of the residue of his means and estate, appointed by his prior deed, of date 3d January 1769, and confer the power of division on Mrs Schaw; and therefore, in so far sustained the reasons of reduction of the said death-bed deed, and also of the deed executed by Mrs Schaw, of date 28th June 1791, in so far as it exercises that power; but repelled the reasons of reduction of Mrs Schaw's deed, in so far as it provides that the losses should be sustained proportionally by her husband's funds and her own; and before answer, as to the question how far Mrs Schaw, in virtue of the powers committed to her by her husband's deed, 3d January 1769, could have made a distribution among her grandchildren, which would in effect have been the same with what she has actually made by the deed under reduction, appointed memorials to be given in upon that point.'

Both parties reclaimed, and memorials were also given in, in terms of the interlocutor.

And, on again advising the cause, the COURT 'repelled the defence pleaded by the defenders, that the deceased Mrs Schaw, in virtue of the powers committed to her by her husband's deed, dated 3d January 1769, could have made a distribution amongst her grandchildren, which would, in effect, have been the same with what she actually made by her deed under reduction; refused the desire of the petition for the defenders; and agreeably to the prayer of the petition for the pursuers, sustained the reasons of reduction of Mrs Schaw's deed, in so far as it provided that the losses should be sustained proportionally by her husband's funds and her own; and, with this variation, the LORDS, of new, found and declared agreeably to their former interlocutor.' *See QUOD POTUIT NON FECIT—TRUST.*

Lord Ordinary, *Craig.*

Act. Solicitor-General Blair, Cullen, Tait.

Alt. Mat. Ross, Hope, Montgomery.

Clerk, Sinclair.

R. D.

Fac. Col. No 47. p. 108.

S E C T. VIII.

Whether a Death-bed Deed will infer recognition against the Heir.
—Blank filled up on Death-bed.—Nomination of Tutors.

1669. July 20.

BARCLAY *against* BARCLAY.

THE Laird of Towy having only one daughter, Elizabeth Barclay, and his lands being provided to heirs-male, disposes his estate to his daughter: In which disposition, there being not only a procuratory of resignation, but a precept of sasine, the said Elizabeth was infeft upon the precept, and being an infant, her friends thinking it might infer recognition, took a gift of the recognition, and now pursue declarator thereon, against the tutor of Towy, heir-male, and Captain Barclay, as pretending right by disposition to the estate. It was *alleged* for the defenders, absolvitor, Because the disposition granted by umquhile Towy to the pursuer, his daughter, was granted on death-bed, at the least it was retained by the defunct, and never delivered till he was on death-bed, and thereby it is null, and cannot infer recognition, because the law, upon just consideration, that parties are presumed to be weak in their minds, and easily wrought upon, after contracting of the disease of which they died, has incapacitate them then to dispoise their heritage, or to take it any way from their nearest heirs. *2dly*, Albeit the disposition had been subscribed, and delivered in *liege poustie*, yet the sasine not being taken till the defunct was on death-bed, recognition cannot be incurred, because it is not the disposition, but the sasine that alienates the fee, and infers recognition. The pursuer *answered*; *First*, That death-bed is only introduced in favours of heirs against other persons getting right, but hath no effect against the superior, who is not to consider whether the vassal was sick or whole, but whether he hath endeavoured to withdraw himself, and his heirs in the investiture, from their superior. *2dly*, Death-bed is never competent by way of exception, but by way of reduction. *3dly*, The disposition being in favours of the dispoiser's only daughter, reserving his liferent, albeit it wants a clause dispensing with the delivery, it being subscribed in *liege poustie*, it is as valid as if it had been then delivered; and if need be, offers to prove that it was delivered in *liege poustie* to the Lord Frazer for the pursuer's use; so that albeit sasine had been taken when the dispoiser was on death-bed, recognition must be incurred, because the vassal should not have granted a precept of sasine, and delivered the same without reservation; and the having of the precept of sasine being always accounted a sufficient warrant for taking of sasine, and that the warrant was given at the delivery of the precept, albeit the sasine was taken when the dispoiser was on death-bed,

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No 57.

The law of death-bed protects the heir, not only against alienation, but it was found effectual against the superior insisting in a declarator of recognition, upon an alienation made upon death-bed.

No 57. yet the warrant was granted when he was in *liege poustie*, by the precept, which bears in itself to be an irrevocable power and warrant to take sasine ; so that the vassal had in his *liege poustie* done *quantum in se fuit*, to alienate this ward-fee.

THE LORDS found, That if the disposition, containing the precept, was delivered to the vassal without reservation in the disponent's *liege poustie*, it would infer recognition, though the sasine was taken after his sickness ; and found, that if the disposition and sasine were on death-bed, it would exclude recognition by way of exception, recognition not being a possessory, but a petitory, or declaratory judgment ; but, seeing it was alleged that the disposition was delivered to the Lord Frazer, the LORDS, before answer, ordained the Lord Frazer to depone from whom, and when, he received the said disposition ; and whether he had any direction to take sasine thereupon, or any direction to the contrary, and also that the bailie, attorney, notary, and witnesses in the sasine should depone by what warrant they did proceed therein.

Fol. Dic. v. 1. p. 215. Stair, v. 1. p. 641.

1678. June 22. BIRNIES against The LAIRD of POLMAISE and BROWNS.

No 58.

A disposition executed in *liege poustie*, but blank as to the disponent's name, was found reducible, as upon death-bed, as the disponent's name was filled up upon death-bed.

UMQUHILE James Short having married Polmaise's daughter without his consent, or tocher, or contract of marriage ; during the marriage, James did provide his wife to the liferent of a tenement in Stirling, and some acres thereabout, and to the stock of 10,000 merks due by Tillibarden, with the burden of his mother's liferent of the tenement and sum ; but thereafter he revoked this disposition, as a donation betwixt man and wife *stante matrimonio*, and disposed the same to his mother, who transferred the right thereof to her oyes Sir Andrew Birnie's children by James Short's sister ; whereupon they pursue reduction against Polmaise, as having now right by progress to the 10,000 merks, as being a donation betwixt husband and wife revocable, and revoked. The defender having *alleged* that there being no contract of marriage, this provision was in place thereof, and therefore was not revocable, especially seeing that it was but a rational provision by a burghess to a gentlewoman's daughter, who had induced him to marry her without her father's consent ;—the pursuer *answered*, That the law had sufficiently provided wives by a terce and third, and any further provision after the marriage was a donation revocable, and so revoked. THE LORDS, before answer, did ordain either party to adduce probation what was the estate of James Short the time of this provision ; and by the probation it appeared, that he had a tenement worth 10,000 merks, burdened with the mother's liferent, and this 10,000 merks, so likewise burdened ; that his mother was a woman near 70 years, and died shortly after ; and that the acres about Stirling were worth two chalders of victual un-liferented by his mother, but that his wife liferented the whole, and that he had 11,000 merks of

No 58.

debt, and therefore found the provision of the fee of 10,000 merks to be exorbitant, and to be revoked as a donation. In the same libel, there was a reduction against James Short his nieces, by another sister called Brown, of the disposition of a tenement in Stirling, failing heirs of his body, on this reason, that albeit it was subscribed before his sickness, yet the persons names were left blank, and were not filled up till he took the sickness, whereof he died; so that on death-bed he could not prejudge his heirs; and it being *alleged*, that before his sickness he had not only subscribed the writ, but had delivered it to the writer, to the use of his nieces, and had given him direction to fill up their names; and that albeit the writer had not done it till his sickness, yet the subscription and warrant before, to fill up the blank, was sufficient to fill up the heir;—it was *answered*, That this warrant at most was but a mandate, which ceased so soon as the constituent was become incapable to dispo.

THE LORDS having ordained the writer and witnesses insert to be examined, the writer, out of whose hand the writ was recovered, did depone, that it was subscribed before the defunct's sickness, but a blank left for the names, and that the defunct, after his sickness, had ordered his nieces, the Browns', names to be insert in the blanks, without any mention that before his sickness he had given warrant to fill up their names, or delivered the writ to their behoof. Whereupon the LORDS reduced the right, in so far as it might concern the Browns; but the question came not to be determined in case the warrant had been given before sickness to fill up the names, and they had only been filled up *in lecto*.

Fol. Dic. v. 1. p. 217. Stair, v. 2. p. 624.

1637. January 18.

PENNYCOOK against THOMSON.

No 59.
Found as
above.

THE reduction pursued by James Pennycook, as assignee by Adam Scot, against Janet Thomson, of her disposition from Adam Scot *ex capite lecti*, is advised. *Alleged, imo*, Adam Scot passed by his son for his horrid ingratitude; in following him with a whinger to stab him; which is *exheredatio cum elogio*. *2do*, Though it was signed blank, and not filled up with her name till he was on death-bed; yet the witnesses deponed, that at the signing (when he was in *diege poustie*) he declared that disposition was for Janet Thomson; so it was all one as if it had depended on an anterior onerous cause; but the LORDS reduced it, and did not regard this, because he might alter his purpose and resolution.

Fol. Dic. v. 1. p. 217. Fountainhall, v. 1. p. 441.

* * * Harcarse reports the same case :

FOUND that the filling up of one Thomson's name on death-bed in a disposition, signed by Adam Scot in favours of ——— in *liege poustie*, was quar-

No 59. reliable *ex capite lecti*, at the instance of the granter's heir; though it was *alleged*, that at the time of subscribing, the disposer declared he intended the disposition in favours of the person whose name was therein filled up in the blank; and that this was equivalent to a reservation to do it *in lecto*.

Harcarse, (LECTUS ÆGRITUDINIS.) No 658. p. 184.

1714. January 28.

JAMES WATSON of Saughton *against* ROBERT WATSON of Muirhouse, and
OTHERS.

No 60.

A tutor named in a testament, with this quality, that he should only be liable for actual intromission, was not found to have the benefit of this quality, from the act 1696, unless the testament was made in *liege pousie*.

IN an action of count and reckoning at the instance of James Watson of Saughton against Robert Watson of Muirhouse, as representing his father, alleged to have been one of the tutors nominate to the pursuer, upon this ground, that he had accepted the office, by signing the inventories of the pupil's estate, and judicially producing them by a procurator;

Answered for the defender; His father's signing the inventories cannot import his acceptance, *Scrimzeour contra Wedderburn, voce Tutor and Pupil*, that being only a preliminary step to discover the pupil's condition, and hazard of the office, before the tutors submit to the burden thereof, and no deed of administration; as making inventories by an executor, without a subsequent confirmation, doth not make him liable *qua talis*. Muirhouse might have signed those inventories, with a protestation, that his so doing should not import his acceptance, *ergo e contra* his signing should not bind him unless he had thereupon accepted. Again, the act of Parliament 1696 enjoins the acceptance of tutory, in the terms thereof, after the making of inventories. Farther, if an heir's making up and signing inventories, in order to enter *cum beneficio*, is not reckoned a sufficient indication of his *animus adeundi*, nor doth infer a behaviour; much less will a tutor's signing of inventories be constructed an act of administration. *2do*, The tutors, by a clause in the father's nomination, are declared liable only for their actual intromissions, and not for omissions, in the terms of the act 1696; now the defender's father had no intromissions, and therefore he the defender ought to be assoilzied.

Replied for the pursuer; A tutor accepting, if he would act legally, and shun the penalties of law, must indeed make inventories, in the terms of the act of Parliament 1672; but his making inventories, according to that statute, is one of the best evidences that can be given of his voluntary acceptance. For when law finds a tutor doing what it requires specially of him in that character, it concludes that he acts as such. The case of *Scrimzeour and Wedderburn* is perfectly different; for there *non constat* that inventories were signed or judicially exhibited, and it was before the act of Parliament 1672 appointing judicial inventories. As to the parallel betwixt inventories which heirs are allowed

to make up to entitle them to *beneficium inventarii*, it hath not yet been determined how far an heir's subscribing inventories to such an end would infer a passive title; but, at the same time, there is no contingency betwixt this and that case, where the making of inventories is in order to entering heir, which may not be said to be done till the service. For, after giving in of subscribed inventories upon the nomination of tutors, nothing remains to complete the nomination; the subsequent acts of administration are the duty of a tutor established in his office, by giving up the subscribed inventory. *2do*, The defender's father could not have the benefit of the qualities in the nomination, from the act of Parliament 1696, in respect the testament, wherein he was named tutor, was made upon death-bed.

Duplied for the defender; Muirhouse being named one of the tutors, with this quality, that he should not be liable for omissions, he must be understood to accept with the same quality; and the pursuer having homologated the nomination as his title, in this process of counting, he must take it as it stands, without dividing the clause, as was found Binning and Alexander, *vocce* HOMOLOGATION. Besides, a nomination, before the act 1696, making tutors liable only for their intromissions, was effectual, both by the civil law, and by our practice. And the statute 1696 is not correctory, but explanatory, of the former law. It doth not alter the case, that *nemo cavere potest ne leges in suo testamento habeant locum*; for that rule hath many exceptions with us, as appears from the brocard, *provisio hominis tollit provisionem legis*, and the approved stile of writs dispensing with the special statutes, and the maxim *cui libet licet renunciare juri pro se introducto*. Again, making of inventories was expressly required of tutors by the civil law; yet all lawyers of any note agree, that it could be dispensed with in testament. Law requires the delivery of writs, but the granter may, by a clause therein, dispense with the not-delivery.

Triplied for the pursuer; When law says that a father may by his deed, in *liege poustie*, make a nomination with such qualities, it clearly follows, that such a qualified nomination, on death-bed, will stand good as to the nomination, but not as to the quality, which doth not at all quadrate with the ordinary case of approbating and reprobating. There is a grand difference betwixt that and the *confectio inventarii* in the civil law; the latter not being absolutely requisite, but only introduced *ad melius esse*, whereas diligence in a tutor is the very essence of his office. Again, without entering into the debate, how far before the act 1696 a nomination of curators could be thus qualified? after the statute it could not be, in regard law determines in what case and manner the privilege shall take place. The brocard *nemo potest cavere* holds in all cases that concern public utility, as tutory doth; and no man can provide, by any writ, that he shall have liberty to dispose of his heritage on death-bed in prejudice of the heir. The maxim *unusquisque potest renunciare, &c.* concerns only private rights and privileges.

No 60.

THE LORDS found, That Muirhouse's signing the inventories, and judicially producing them by a procurator, doth sufficiently infer his acceptance of the tutory; and found, that he cannot have the benefit of the qualities in the nomination from the act of Parliament 1696, unless the testament was made in *liege poustie*.

Fol. Dic. v. I. p. 215. Forbes, MS. p. 18.

S E C T. IX.

Reserved Faculties whether reducible upon Death-bed.

1662. June 28. Dame MARGARET HAY *against* GEORGE SEATON of Barnes,

No 61.

A man disposed his estate to his heir with a reserved faculty to burden it with a certain sum. The burden was sustained against the heir, though the faculty was exercised upon death-bed.

UMQUHILE Sir John Seaton of Barnes, having provided George Seaton his son, by his contract of marriage, to his lands of Barnes, some differences rose amongst them, upon fulfilling of some conditions in the contract: For settling thereof, there was a minute extended by a decret of the Judges, in *anno* 1658, by which the said Dame Margaret Hay, second wife to the said Sir John, was provided to L. 100 Sterling in liferent; and it was provided, that Sir John might burden the estate with 10,000 merks to any person he pleased, to which George his son did consent, and obliged himself to be a principal disposer. Sir John assigned that clause, and destinated that provision, for Henry Seaton his son in fee, and for the said Dame Margaret Hay in liferent; whereupon she obtained decret before the Lords, the last session. George suspends the decret, and raises reduction, on this reason, that the foresaid clause gave only power to Sir John to burden the estate with 10,000 merks, in which case George was to consent and dispone, which can only be understood of a valid, legal, and effectual burden thereof; but this assignation is no such burden, because it is done in *lecto ægritudinis*, and so cannot prejudice George, who is heir, at least apparent heir, to his father. The charger *answered*, That the reason was no way relevant, 1st, because this provision was in favours of the defunct's wife and children, and so is not a voluntary deed, but an implement of the natural obligation of providing these. 2^{dly}, This provision, as to the substance of it, is made in the minute, and extended contract, in the father's health; and there is nothing done on death-bed but the designation of the person, which is nothing else than if a parent should, in his lifetime, give out sums payable to his bairns, leaving their names blank, and should on death-bed fill up their names. The suspender *answered*, That he opposed the clause, not bearing *de presenti* a burden of the land, but a power to his father to burden; neither hav-

ing any mention of death-bed, or in *articulo mortis*, or at any time during his life; and though the deed, on death-bed, be in favours of wife and children, it hath never been sustained by the Lords in no time, though some have thought it the most favourable case.

No 61.

THE LORDS sustained the provision, and repelled the reason of reduction, assoilzied therefrom, and found the letters orderly proceeded.

Fol. Dic. v. 1. p. 215. Stair, v. 1. p. 116.

1663. February 25. HEPBURN against HEPBURN.

No 62.

IN a destination of succession, in favour of heirs-male, there was a clause bearing, 'that it should be liesom to the said Thomas, at any time during his life, to alter the same.' This was found not to validate an alteration upon death-bed, though in favour of the heir of line.

Fol. Dic. v. 1. p. 215.

* * * See The particulars of this case Sect. 1. b. t. No 1. p. 3177.

1668. December 16. MARGARET BRYSON against ANDREW BRYSON.

No 63.

MARGARET BRYSON being the only child procreate of the marriage betwixt Andrew Bryson and Elisabeth Elphinston, being infest in an annualrent out of the lands of Craigton, effeiring to the principal sum of 7000 merks, did thereupon pursue a poiding of the ground against Mr Andrew Bryson her brother, who had right to the saids lands from John Johnston, to whom the said Andrew's eldest son had disposed the saids lands, being infest therein by his father before the said Margaret was infest in the annualrent foresaid. It was *alleged* for the defender, That he had a reduction on the pursuer's infestment as being granted *in lecto*. To which it being *replied*, That the reduction could only be sustained at the instance of the heir; whereas the right of fee, granted by Andrew Bryson to his eldest son, did only make him represent his father *passive* as successor *titulo lucrativo*, but gave him no active title to pursue this reduction *ex capite lecti*, nor none having right from him. *2do*, The pursuer's infestment depended upon a contract of marriage; and the said Andrew Bryson having burdened his fee of the said lands, disposed to his eldest son, with a power and liberty to affect the same at any time before his decease, the pursuer's infestment could never be quarrelled *ex capite lecti*.—THE LORDS assoilzied from the reduction, and sustained the infestment, notwithstanding that it was alleged, that that power to burden, at any time before his decease, behoved to be interpreted

A father disposed his estate to his eldest son, reserving power, at any time during his life, to alter. This power he exercised on death-bed, which was found good against the donee, who was heir, as he had accepted and bruik by the disposition, containing this power to burden at any time during life which includes also death-bed.

when he was in his *liege poustie*, and not in *lecto ægritudinis*, unless it had been so expressed.

Fol. Dic. v. i. p. 215. Gotford, MS. No 64. p. 23.

* * * The like was found in the case Douglas against Douglas, *voce ADULTERY*, No 6. p. 329.

1676. December 9.

KER against KER.

No 64.

A deed not delivered till the party be in *lecto* is reducible.

JANET KER as heir to John Ker her grand-sire, pursues reduction of a disposition granted by the said John in favours of Ninian Ker, son to Patrick Ker his second son, of a tenement in Rothsay, on this reason, that albeit the disposition bear date several years before the disponent's death, yet it was no delivered evident, till the disponent was on death-bed, and doth not contain a clause to be valid, though not delivered during the disponent's life, or *liege poustie*. This reason being found relevant, and admitted to probation, there were only two witnesses which knew any thing, the one Gilchrist a notary, who depones, that two or three days before the defunct's death, he delivered to him this disposition, and desired him to draw two disposition of the same tenor of the equal halves of the tenement, the one in favours of Patrick Ker his son, father to Ninian, the other in favours of Janet Ker, daughter to his eldest son deceased: And for that effect he subscribed two blanks, which were filled up after the defunct's death, and delivered to John Kelburn by his order; which two dispositions are also produced. John Kelburn depones, that John Ker delivered to him the disposition to Ninian seven years before his death, and that three days before his death he called for the same, which Kelburn having put in a chest of the defunct's, some days before, took it out thereof, and brought it to the defunct, who delivered it to Gilchrist the notary, to frame other two dispositions by it. There is also produced an act in a process of exhibition before the Bailie of Rothsay, bearing, that Kelburn being pursued to exhibit the disposition to Ninian, did depone that he had received it from John Ker, for the behoof of Ninian his oye. At the advising of this cause, it was *alleged*, that the reason was sufficiently proven, two witnesses concurring, that Ninian's disposition was in the disponent's hands on death-bed, and one of them only deponing, that it was delivered to him of before. It was *answered*, *imo*, That this being a disposition in favours of an oye, it is valid without delivery, the good-sire's custody being the oye's custody. *2do*, That this writ was only delivered on deathbed, is not proven, because Kelburn one of the two witnesses depones it was delivered to him before. The pursuer further *alleged*; that suppose it were proven that the disposition was delivered to Kelburn in *liege poustie*, yet Kelburne did not depone in this process, on what terms it was delivered to him; and therefore *quod est verisimilius præsumitur*, that John Ker gave him

the disposition in keeping, not to incapacitate himself to recall it, otherwise he would have given it to his son Patrick, Ninian's father, which is further confirmed, Kelburn giving it back at John Ker's desire, which had been a breach of his trust, if it had been delivered to him in place of Ninian, to make it an irrevocable right, which cannot be presumed. And as for the act of Rothsay, it was by collusion, and it does not appear that Kelburn subscribed his oath, but before the Lords, though it was most proper to the purpose, neither doth it express what was said to him by John Ker, when he gave him the disposition, and the deponing that it was to Ninian's behoof, may be his conjecture. It was answered for the defender; that writs in favours of children, require no delivery; and though this be a grand-child, and not of the family, yet any delivery is sufficient, unless it had been expressly qualified on these terms, to be re-delivered to the disponent at any time in his life, and even in that case death-bed excluded any alteration, the law having presumed that defuncts are then weak, and therefore disabled them to do any deed, not only in prejudice of the heir, but of the wife and bairns. 3^{tie}, There is no alteration made, but the subscribing of blank papers, in which nothing was written, till after the defunct's death. 4^{to}, Ninian's disposition is not simply recalled, but *qualificata et ad specialem effectum*, viz. to divide the right betwixt Patrick and the pursuer Janet, who therefore can only claim right to the half.

THE LORDS found that it was not proven that this disposition remained an undelivered evident, till the disponent was on death-bed; but found that the issue depended upon the terms of the delivery to Kelburn, that if the deliverer exprest that it should be at his call, he might recall it even on death-bed, not being in prejudice of his heir, his wife's third, or bairns part; and therefore ordained Kelburn to be re-examined in their presence, whether John Ker delivered to him the disposition, without saying any thing; or whether he exprest that it was to be kept for, and delivered to Ninian, which they found relevant to make it a valid right in favours of Ninian; but if a power to recall were exprest, reserved to themselves to consider, whether the revocation being in favours of Patrick and Janet, their rights would thereby stand; or, if nothing were exprest, whether the terms were to be presumed, that the disposition should be in the disponent's power to recall it during his life, or it should be irrevocable, as simply delivered.

January 25. 1677.

In the competition betwixt these parties, wherein there is an interlocutor observed before upon the 9th of December 1676; John Ker having disposed a tenement first in favour of Ninian Ker his oye, by Patrick Ker his second son, and having delivered the disposition to John Kelburn, and nothing appearing upon what terms, or what he had exprest when he delivered the disposition, nor any time thereafter till he was on death-bed, at which time he called for the disposition from John Kelburn, which he brought to him, and he did then deliver the same to M^cGilchrist a notary, and subscribed two blank papers, and ordered him to fill up both dispositions according to the first disposition, the

A deed not delivered is in the absolute power of the granter, and therefore cannot prevent him from executing contrary deeds on death-bed.

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one in favours of Patrick the son, of the one half of the tenement formerly disposed to Ninian, and the other in favours of Janet, only daughter to umquhile John his eldest son ; this being the matter of fact appearing by probation ;

THE LORDS found, that the delivery of a gratuitous disposition, not being delivered to the party in whose favour it was granted, or to his father, or to any other whose custody might be held as the custody of Ninian who was a pupil, but being delivered to Kelburn a stranger, without expressing that it was to the behoof of Ninian, or to be kept for him, or delivered to him when he came to age, neither yet being delivered to Kelburn on these express terms, till it were called for by the disponent, that therefore the condition and terms implied and presumed by the delivery, as aforesaid, did not so far complete Ninian's right, as that the disponent might not recal his disposition, but that the disponent's trust was presumed to be, to re-deliver the disposition to the disponent, if during his life he called for it, and if not, to deliver it to Ninian after his death ; and therefore found that the disponent might, and had recalled it, and that if he had recalled it simply, the new disposition on death-bed would not have been effectual against Janet his heir, but having recalled it *specificate*, and *ad qualificatum effectum*, to give Janet the heir the half, and Patrick the other half, they therefore sustained the two dispositions, though subscribed *in lecto*, seeing the heir, the wife and bairns are secured by the law *de lecto*, but a disposition revocable to any other person might be recalled effectually *in lecto*, neither could the heir quarrel the qualified revocation, but behaved either to accept of it *in toto*, as it was, or to reject it *in toto*, and thereby get nothing, the first disposition remaining effectual, which being in *liege poustie*, did absolutely exclude the heir.

Fol. Dic. v. 1. p. 215. Stair, v. 2. p. 474. & 499.

* * * Gosford reports the same case :

In a reduction pursued by the said Jean Ker, as heir, served and retoured to her good-father John Ker of Rosyth, of a disposition made by the said John to Ninian Ker his oye by a second son, on this reason, that it was never a delivered evident by the good-father until he was on death-bed, at which time he could do no deed in prejudice of his heir ;—it was *answered* for the defender, that the disposition of the tenement of lands and acres therein contained was subscribed by the good-father, in his favours, five years before his decease or sickness, and being now in his possession could not be taken away but by his oath or writ. Likeas she offered him to prove that the same was a true delivered evident by the father to John Kelburn, and accordingly he had the same ay and while he did recover it by a decret obtained before the Sheriff ; and so in law it is presumed, that the granter not having given it up upon any conditions that he might be master thereof during his lifetime ; it was truly

delivered for the defender's use, and so kept by John Kelburn. It was *replied*, that it was offered to be proven that it was in the father's chest and custody the time of his decease, during which time he did call for the said disposition, which was brought to him, and did order a writer to draw up two new dispositions, one in favours of the defender's father, Patrick Ker, and the other in favour of the suspender, for the equal half of the said tenement and lands, which was a clear evidence that he was still master of the first disposition; and as to these dispositions being truly made and subscribed on death-bed, they could not prejudice the pursuer who was heir. THE LORDS ordained the said John Kelburn, and the writer, and witnesses of the new disposition to be examined, and finding that Kelburn did prevaricate in his deposition, and did not make a direct answer if the first disposition was truly delivered to him for the behoof of the defender, but that he kept the same in his custody until the disponer called for it upon deathbed, and delivered it to him, after which he ordered the two new dispositions to be drawn, and subscribed them, and that he immediately delivered the same back to him; as likewise finding by the depositions of the writer and witnesses, that the two new dispositions were filled up after they were subscribed and left by the father; they did thereupon long debate the said case before decision, and at last found, that the first disposition, being a clear right in favour of his grandchild, by a second, which would have given him an undoubted right, if it had not been recalled; yet the said disposition, bearing an absolute right of the whole lands, without so much as reserving the goodfather's own liferent; and being put in the hands of Kelburn only upon that reason, if he himself had retained it till his death, and had then delivered it, it would have been *ipso jure* null;—that therefore in law it ought to be presumed, that it was only delivered to be kept until such time as he might deliberate whether to alter the same or not; which he having done by two new dispositions, taking away from his apparent heir only the half of the lands, she being a woman who might marry a stranger, and giving the other half to his second son, and the defender, his oye, that it might remain with the name; therefore they decerned that the first could not be looked upon as a delivered evident for the oye Ninian, who had only recovered it after the good-sir's decease, from Kelburn; and so having exercised his power to alter, albeit upon death-bed, that the said two new dispositions should take effect, and the estate divide accordingly, albeit made upon death-bed, which was hard.

Gosford, MS. No 946. p. 624.

1685. December.

BROWN against CONGLETOUN.

GEORGE COCKBURN of Pilton as principal, and Sir Robert Hepburn of Keith as cautioner, having granted bond to Thomas Brown, stationer in Edinburgh, for 2000 merks; and he having pursued Robert Congletoun, for payment, as

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No 65.

A person having tailzied his estate to a stranger,

No 65.

with this provision, that the disponent should be bound to pay all his debts contracted, or to be contracted, and that should be due at his decease, but without the clause *etiam in articulo mortis*; and having thereafter granted a bond upon death-bed; the Lords found, that the disponent was burdened with the said quality in the disposition, and therefore that he could not reduce the bond as granted on death-bed.

he who had accepted of a disposition from Sir Robert of his estate, with the burden of all debts contracted by Sir Robert in his lifetime, and due at his decease, which he obliged the said Robert Congletoun to pay, as he would eschew the wrath of God.—*Alleged* for the defender; That the bond was null, as being granted by Sir Robert when he was upon death-bed; and so cannot oblige the defender, who is heir to him, at least universal successor, by the foresaid disposition; and upon that ground had raised reduction, which he repeated.—*Answered*; That the defender could not quarrel the bond as being granted upon death-bed; because he had accepted of a disposition, with the burden of all his debts contracted in his lifetime, and due at his decease; which must comprehend debts contracted upon death-bed, as well as *in liege poustie*, as was decided 22d June 1670, Douglas of Lumsden *contra* Douglas, No 6. p. 329. where it was not found relevant to reduce a bond granted on death-bed, by a party who had disposed his estate, reserving a power to himself to burden it in any time during his life, though it did not bear *etiam in articulo mortis*; much more in this case, seeing the disposition did not only bear the foresaid reservation, but an imprecation obliging the defender to pay the debt, as he would eschew the wrath of God, which did evince Sir Robert's *enixa voluntas*, that all his debts contracted, or to be contracted by him, should be paid.—*Replied*; That these words in the disposition, that the defender, by the acceptance thereof, should be obliged to pay all debts contracted by the said Sir Robert in his life time, or due at his decease, can only be understood *in terminis juris*, as to such debts that Sir Robert contracted in his *liege poustie*, when he was capable to contract debt, and not of debts contracted on death-bed; especially seeing it does not bear a reservation to contract debts *etiam in articulo mortis*.—THE LORDS found, That Congletoun, as heir of tailzie, is burdened by the quality of the disposition, made by Sir Robert Hepburn to him, for payment of debts contracted, or to be contracted by Sir Robert, at any time in his life time; and that Congletoun had not the benefit of reduction of the foresaid bond, as being contracted on death-bed.

Fol. Dic. v. 1. p. 215. Sir P. Home, MS. v. 2. No 749.

*** Harcarse reports the same case :

In a pursuit at the instance of Robert Brown, against young Congletoun, as heir of tailzie to Sir Robert Hepburn of Keith, for payment of 2000 merks Sir Robert stood cautioner for Pilton;

Alleged for the defender; The bond was signed by Sir Robert on death-bed, when he could not prejudice his heir.

Answered; The tailzie contains a quality, that the defender should satisfy all Sir Robert's debts contracted, or to be contracted at any time of his life.

Replied; Any time in a man's life imports only *liege poustie*, as was found in

Humbie's case, No 1. p. 3177.; and had Sir Robert intended the clause to be more comprehensive, the words *etiam in articulo mortis* would have been adjected.

Duplied; Though rights in favours of apparent heirs, with a clause to burden at any time in the disponent's life, would not be extended to give him such a faculty on death-bed; yet a greater latitude must be allowed here to the granter of a new tailzie in favour of a remote relation; *2do*, Such was the defunct's *enixa voluntas* to have his debt paid, that he charged the defender to satisfy the same, under the pain of God's curse and displeasure.

Triplied; That imprecation could extend no further than the power reserved, viz. to satisfy deeds in *liege poustie*.

THE LORDS having considered the circumstances in this case, they decerned the defender to pay the debt.

Harcarse, (LECTUS ÆGRITUDINIS.) No 655. p. 182.

* * * The following is a sequel of the same case :

1687. February 3.

HEPBURN of Keith *against* The OLD LADY KEITH and JEAN COCKBURN,
Pilton's Daughter.

THE deceased Sir Robert Hepburn of Keith left his estate to Congalton's son, with the burden of all debts and obligations he should adject at any time in his life; and on death-bed he ordains him, by a writ under his hand, to marry the said Jean Cockburn, otherwise to lose the estate; and neglects to provide it to another in this event; *ergo* it would be caduciary, and so belong to the King as last heir. He being required to marry by way of instrument, and having refused, a declarator of his amitting the estate is raised.—*Alleged*, *Imo*, Reserved faculties to burden, or adject qualities or conditions to tailzies or estates, must be understood *in terminis habilibus juris*; *ergo* they should not be exercised *in lecto*, no more than a man can validly reserve a power to himself to dispo-
ne, though he should be furious or an idiot; nor can a clause in the King's charter give any such power on death-bed; *2do*, All adjected clauses restricting *libertatem matrimonii*, and imposing a penalty in case of contravention, are reprobate as unlawful conditions, *cum matrimonia debeant esse libera*; and this case is clearly so stated, *Capitul. 29. extra. de sponsal.*—*Answered*, If I convey to you my estate, I can do it with what qualities I please. This being advised on the 17th of February, the LORDS assolizied from Hepburn of Keith's reduction, and repelled the reason of death-bed; and found that Sir Robert Hepburn of Keith might *etiam in lecto* burden his disposition with what qualities and conditions of marriage he pleased.

Then the LORDS, on a bill, allowed him to be further heard on their declarator of his having lost the estate, and its being caduciary, and fallen to the King. He likewise craved to be heard on the personal objections against the woman offered, as being once furious; and to instruct that the last paper signed by Sir

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No 66.

Found, that a party *etiam in lecto*, might exercise a reserved faculty of burdening his estate with what qualities or conditions he pleased.

No 66. Robert, ordaining his heir to marry the said Jean, was elicited, and contrary to his former intentions. *Queritur*, If the offering to marry her now will preserve the estate to him, seeing he has so contumaciously refused it all along? And they whisper there is a donatar already named by the King for that estate.

January 25. 1688.—THE LORDS found the quality of his marrying the said Jean, adjected by Sir Robert to his disposition, affected it, though it was on death-bed, and that he behoved either to fulfil it or lose the estate; and the LORDS gave him eight days longer to deliberate, and declare if he would marry or not; else they would proceed. And in case he refused, Blair Drummond had a gift ready from the King of the *ultimus hæres*, because Sir Robert had not provided to whom it should go on his refusal; and so there would be a caducity. But he redeemed this process, and obtained a discharge, by a composition of L. 10,000 Scots to the gentlewoman.

Fol. Dis. v. 1. p. 116. Fountainball, v. 1. p. 445. & 494.

* * * Harcarse reports the same case :

SIR ROBERT HEPBURN of Keith, having disposed his lands to his nephew young Congleton, reserving power to alter and burden at any time in his lifetime, and dispensing with the not delivery, and requesting the receiver of the disposition to perform all his deeds and orders, as he would escape the wrath of God. In pursuance of this power, Sir Robert, by writs under his hand, left 14,000 merks to his Lady, who had a jointure of 6000 merks a-year, and he ordained Congleton his heir to marry her niece, Pilton's daughter: Of these two deeds reduction was raised, *1mo, Ex capite lecti*; *2do*, upon this ground, That they were never delivered.

Alleged for the defender, *1mo*, The reserved power to alter and burden at any time in his life, includes *etiam articulum mortis* in new tailzies, which the heir must either accept with the quality or repudiate, he not being *alioqui successurus*; especially considering the imprecation adjected to the not performance; *2do*, The dispensation with delivery in the disposition, imports the like dispensation in favours of deeds done by virtue of the reserved power, which are to be reputed a part of the disposition.

Answered; Such provisions would then destroy the law of death-bed.

THE LORDS found, That the clause and reservation in this new tailzie did empower Sir Robert to do deeds on death-bed, which cannot be quarrelled by the heir; and that the delivery thereof was not necessary. Here the heir was in-fest in Sir Robert's lifetime, and had homologated and used the right; but the question was about the import of the word *lifetime*.

Harcarse, (LECTUS ÆGRITUDINIS.) No 657. p. 183.

1687. November 17. DAVIDSON against DAVIDSON.

THE case of James Davidson against Mr Alexander his brother was debated. Mr Alexander Davidson, advocate at Aberdeen, their father, in 1675, acquires the lands of Newton to himself in liferent, and his eldest son, Mr Alexander, in fee, reserving always to himself an express faculty to alter the said fee, and to dispoise it *etiam in lecto*. Afterwards, being disoblged by his eldest son, he revokes his fee on death-bed, and turns it to a liferent, and dispoises the fee to James the second son. Mr Alexander, after his father's death, raises a reduction of the second disposition, *imo*, because his wife had married him in contemplation of this estate, and brought a considerable fortune with her; *2do*, He could not exerce the reserved faculty, *nisi modo habili et tempore legitimo*, in his *liege pousie*, else that cardinal law of death-bed shall be supplanted by such reservations, which has hitherto preserved our estates sacred and entire against wives, children, and churchmen, and makes us die in quiet. *3tio*, The clause *etiam in articulo mortis* takes only effect where the disposition containing that clause is made to an assumed heir, and a stranger who is not *alioqui successurus*, and so must take his right with all the qualities annexed; but an eldest son may enter *aliunde*, and so it ought not to be exerced against him *in lecto*; else this were to exheredate him *absque elogio*. *4to*, A reservation to grant deeds on death-bed, must be construed of rational considerate deeds, and not where it is evident he has proceeded by passion, solicitation, and suggestion, *aut delinimentis novercalibus*, or that it is *factum inofficiosum contra pietatem*; and they cited these decisions in Stair, 25th February 1663, Hepburn, No 1. p. 3177.; 24th July 1672, Porterfield, No 2. p. 3179.; and 7th June 1676, Yeoman, *voce* FACULTY; and Craig *de feudis*, page 130. Answered to the reasons of reduction, That the law of death-bed is very fundamental, but yet it has its exceptions, where the deed depends on an anterior cause, viz. a reserved faculty in *liege pousie* to alter *etiam in articulo mortis*; which certainly may be exercised at any time when he is *mentis compos*; else this were to abridge the parental power, and stir up their children against them; and that this was clearly decided *supra*, 3d February 1687, Hepburn, No 66. p. 3253.; and the like was found 28th of June 1662, Hay, No 61. p. 3246.; and 23d June 1670, Douglas, No 6. p. 329. observed by Stair; and, in a narrower point, the Lords found a father might alter his eldest son's fee, given him in his contract of marriage, which dissolved within year and day, and bestow it on his second son, Burleigh, *voce* HUSBAND AND WIFE. *2do*, Death-bed may be as well dispensed with by a clause, as the not delivery of a writ is dispensible with by a like clause; the one being as great a nullity as the other: And faculties need not be exerced *in forma specifica*; as Stair observes, b. 2. t. 3. § 54. and Hop-Pringle, *voce* FACULTY: And we have not the nicety of the Roman exheredations, who behoved either to institute or disinherit, under the pain of nullity of the testament; but, with us, a father may dispoise

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A father took an estate to himself in liferent, and his eldest son in fee, with a reserved faculty to innovate in *articulo mortis*. A death-bed deed in favour of his second son was reduced.

No 67.

to any son, *sine quærela inofficiosi*, even as by the Roman law he could give the patronage of a slave to any child he pleased : And here Mr Alexander could not succeed to this estate as heir, because his father was never fiar, and so the inquest could not retour nor answer that head of the brieve, *quod pater obiit ultimo vestitus et sasitus ut de feodo*. 3^{to}, The decisions cited meet not ; for, in Humby's case, the faculty wanted the clause *in articulo mortis*, and only bore at any time in his life ; and in the rest, the heir could repudiate that right, and enter by another title, which Mr Alexander the pursuer cannot do here : And Craig is speaking of succession to Crowns, and not of private men's successions ; being in answer to Doleman, or Jesuit Parson's book against King James's succeeding to the Crown of England. 4^{to}, It was not here an entailed estate, but all purchased by old Mr Alexander's virtue and industry ; and the eldest son had proven ungrateful, whereof the father was best judge, and should not be put to prove it ; and Christ, in the parable of the labourers, has determined this case, ' May I not do with my own as I please ; I will give to the last born as much as to thee.' 5^{to}, He had homologated this disposition, by pursuing on it since his father had exercised the faculty, and possessing the lands by virtue of it ; and he is not totally exhoredated ; for his father has given him 18 chalders of victual and the liferent ; and his wife's portion was but inconsiderable.

THE LORDS having, on the 24th of November, advised this cause, they found that the father in this case (for they would not generally decide it *in tota latitudine*) could not, by virtue of his reserved faculty, alter and retract his eldest son's fee on death-bed, nor dispoise it then to the prejudice of his apparent heir ; and therefore reduced the second son's disposition. The President was not clear in this, but the plurality carried it ; for they thought, that if these reserved faculties were once allowed to be exercised *in lecto*, (which clause was first introduced and advised by Sir Thomas Nicolson advocate) the good law of death-bed should be evacuated, and that this was *fraudem legi facere*, and so every one hereafter would reserve that power ; and though it seemed to restrict parents power, yet such a faculty was rather a snare and prejudice to parents, than a favour, and was not to be desired : And though one, in moveables, should reserve such a power, yet on death-bed he would not be allowed either to wrong his relict's part or bairn's legitim, and even so here by the analogy of law ; for no man can reserve to himself, that he shall have then solidity of judgment ; without which he ought not have power ; and in Keith's case he was a stranger, and had no other way to bruik the estate, but by the disposition bearing that burden. Yet here Mr Davidson could not be heir, his father not being fiar.

In Irvine of Drum's case, the like point falls to be debated, but with this difference, that Drum's faculty and power is given him in the King's charter under the Great Seal, which he had exercised in favours of his children of the second marriage, against his eldest son ; and though *pactis privatorum non derogatur juri publico, et nemo potest pacisci, ne leges in suo testamento locum habeant* ; yet

there is more to say where the King gives and allows the power, than when it is only reserved by the party.

Mutual bills having been given in against this interlocutor, and the same being advised 3d December, the LORDS ordained the eldest brother, pursuer, to prove that his father was *in lecto* at the time of exercising the said faculty, by signing the second disposition; and also, before answer, to prove that he was imposed on, and himself kept from having access to him, and what composure of spirit he was then in; and also allowed the second brother to prove what acts of disobligement or ingratitude the eldest had committed against his father, which might provoke him to put this estate by him; by which last tour, the President brought this case to the principles of equity and justice, and somewhat rectified and corrected the harshness of the first interlocutor.

Fol. Dic. v. 1. p. 216. Fountainhall, v. 1. p. 478.

* * Harcarse reports the same case :

MR ALEXANDER DAVIDSON having acquired some lands to himself in liferent, and his eldest son in fee, reserving power to himself to alter and innovate at any time in his life, *etiam in articulo mortis*; and having, by virtue of the reserved faculty, made a new disposition in favour of his second son, the eldest raised reduction thereof *ex capite lecti*.

Alleged for the defender; That the pursuer had no interest to reduce, because he could not succeed as heir to the father in these lands, who was not fiar, but had only a personal faculty to dispo. *2dly*, The pursuer being infest as fiar upon the right wherein the faculty was reserved to his father, he cannot repudiate the exercise thereof. *3dly*, It is usual for a person infest from the King to reserve power to name his heir *in lecto*.

Answered; Though the fee was originally taken to the pursuer, the father had it in effect by the reserved faculty; and though the pursuer could not properly succeed by a special service to his father, who died not seized in the fee, yet he may come to have right to the lands by a declarator, and the extraordinary remedy of reduction. *2dly*, The pursuer being infest when he was a child, and never having homologated the faculty therein reserved, cannot be hindered to quarrel the same. *3dly*, Such provisions in the King's charters have not been questioned, and are granted *periculo petentis*; and if reservations of that nature were effectual, every body would make them, and so elide the excellent law of death-bed. *4thly*, Though such a reservation might take place against a right made to one who is not *alioqui successurus*, it can have no effect against apparent heirs, either in new or old feus; because apparent heirs may enter by law, passing by the qualified deed, unless they have homologated the same, whereas others cannot have access but by acknowledging the qualified right, and so must either take it *cum onere*, or repudiate it.

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Replied for the defender ; The faculty to dispone is most ample ; and in the cases of Douglas, No 6. p. 329. and of Keith, No 66. p. 3253. the clause at any time in the disponent's life, without the words *etiam in articulo mortis*, was found to extend to death-bed. *2dly*, The pursuer has homologated the qualified right, by using it as the title of his reduction in his own name.

Duplied ; The practiques of Lumisdane and Keith do not meet this case, seeing there the qualified disposition was not granted to an apparent heir ; and, in Humble's case, a reserved power to dispone at any time during life was not extended to support a deed on death-bed, in favours of the disponent's own daughter and heir of line, in prejudice of a former tailzie to his brother, (No 1. p. 3177.) *2dly*, The pursuer's using the right, in order to quarrel the reservation therein, and its effect, cannot import homologation.

THE LORDS, before the question was well understood, reduced the second disposition, and repelled the defence of homologation as it was qualified. But thereafter the interlocutor was stopped, and the act made for trying if the second disposition was in *liege poustie* or *in lecto*, and if the disponent was *sane mentis* at the granting thereof. And the second brother apprehending that the father would be found to have been not *satis compos mentis*, the matter was settled by a friendly transaction ; and the second interlocutor, reducing the second disposition, bore to be of consent of parties, that it might not be a preparative. See this decision observed by Dirleton in his Doubts, page 150.

Harcarse, No 659. p. 184.

No 68.

A man dis-
posed his es-
tate to his
son, with the
burden of
provisions to
his younger
children,
granted or to
be granted.
He granted a
bond of pro-
vision to one
of his daugh-
ters on death-
bed. The
Lords found
this bond not
reducible *ex
capite lecti*, by
the heir who
had accepted
the disposi-
tion.

1706. February 8. BERTRAM of Nisbet *against* WEIR (or VEIR) of Stanebyres.

JAMES WEIR, late of Stanebyres, gives a bond of provision to his daughter, Mary Weir, for 3000 merks. She, and Gilbert Kennedy, younger of Auchtifardel, her husband, assign it to Bertram, and he pursues Stanebyres on the passive titles for payment. *Alleged*, The bond was granted when his father had contracted the sickness whereof he died ; and though he lived several months after, yet he never went to kirk nor market ; and repeated a reduction he had raised of it upon that head. *Answered*, You can never quarrel this deed, neither *ex capite lecti* nor on any other ground, because you have consented thereto, and accepted the right with the burden of it, in so far as your father, of the date of this bond, disponded to you his estate, with the express burden of all provisions, either already granted or to be granted by him in favour of his younger children, by which you bruik and possess the estate to this day, without ever revoking or repudiating the same, or ascribing your possession to any other title ; so you must have it, with the condition, quality, and burden of this bond annexed thereto ; neither can you separate them ; and, by accepting the disposition, you have as much homologated and acknowledged this bond, as if you had granted it yourself. *Replied*, Though he has accepted a disposition from his

father, with the burden of the provisions he should nominate and appoint for his bairns, yet that must be understood *civiliter et in terminis habilibus*, that the provisions be made in the granter's *liege poustie*, and not on death-bed; seeing the clause does not bear that he shall be liable, though they be granted at any time in his life, *etiam in articulo mortis*; and if it were otherwise, that excellent fundamental law of death-bed should be overturned, which is the great barrier and security of our estates, and is founded on the best of reasons; *1mo*, To free us from the importunity of churchmèn, wives, and other friends and relations at that time; *2do*, To teach us to provide our younger children in *liege poustie*, when our executry is not sufficient to serve them. Yea, Sir John Nisbet of Dirleton, and many of our lawyers, doubted if a power given by the King, in his charter under the Great Seal, to dispoñe or contract debt on death-bed, would be a legal warrant to sustain such deeds; and if so, then *multo minus* should a faculty reserved by a party himself, in a private writ, empower him to dispense with and subvert that useful and necessary law of death-bed; seeing *pactis privatorum nequit derogari juri publico*; and no man can provide *ne leges in suo testamento locum habeant*; and in a famous case, decided in November 1687, Davidson *contra* Davidson, No 67. p. 3255. the Lords found such a faculty to alter *etiam in lecto*, did not empower the father to dispoñe the lands to his second son when he was on death-bed, and resolved to keep that law sacred and inviolable; and much more ought the Lords to keep this rule, when the power does not mention these words, that they may exercise it *etiam in lecto et ipso mortis articulo*, which is the present case. See Stair, 25th February 1663, Hepburn, No 1. p. 3177. *Duplied* That the providing of younger children is favourable, and depends on an antecedent natural obligation, and has been so decided, 28th June 1662; Hay, No 61. p. 3246. where such a faculty having been exerced on death-bed, and quarrelled on that head, the Lords sustained the bond, and assoilzied from the reason of *lectus ægritudinis*: And any small insinuation has been laid hold on to infer the heir's consent, as Dirleton observes, Haliburton, *voce* HOMOLOGATION, and Stewart's case there cited, that signing as witness imports consent; though now of late, in Dallas's case, *voce* HOMOLOGATION, the Lords have receded from that practise. See Dirleton, *tit. Reduction ex capite lecti*; Stair, 24th July 1672, Porterfield, No 2. p. 3179.; and lately Erskine's pursuit against Erskine her brother, 4th January 1705, *voce* HOMOLOGATION—THE LORDS, in arguing the case, thought, if this bond of provision was either prior or of the same date with his right and disposition, that it ought to exclude the reason of death-bed; but the disposition being amissing, and yet not much controverted by Stanebyrès, but they might be of one date, therefore the Lords proceeded on that supposition, and thought his bruiking by that right, which bore the quality and reservation of any provisions made or to be made to his younger children, was a tacit and implicit acknowledgement of the bond, and secluded him from proponing death-bed, or reducing it on that head; though it would not supply other nullities, as

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if it wanted writer's name and witnesses, or had been extorted by force or fear; and when an overture was moved in the Parliament 1672, to allow heritors to burden their estates with three or four years rent, on death-bed, for providing younger children, the motion was rejected, as tending to destroy the ancient families of the nation. Some proposed to try what condition Stanebyres's estate was in at the time of his decease, and what debts and burdens affected the same, that it might appear whether this bond of provision was rational and moderate, or excessive and exorbitant; but the Lords decided *ut supra*, and repelled the reason of death-bed in this case *me referente*.

Fol. Dic. v. 1. p. 216. Fountainball, v. 2. p. 324.

* * Forbes reports the same case :

IN the action at the instance of Alexander Bertram of Nisbet, as assignee to a bond of provision of 8000 merks granted by the deceased James Weir of Stonebyres, to Mary Weir his daughter, against William Weir, now of Stonebyres, as having accepted from the granter his father, a disposition of his estate, with the burden of provisions made, or to be made, in favours of the younger children, and possessed 24 years by virtue thereof; which bond is of the same date, or prior to the disposition;

Alleged for the defender; Absolvitor; because the bond was granted by his father *in lecto ægritudinis*, and he had raised reduction on that head which he repeated. And his acceptance of the disposition with the general burden of provisions to younger children, could only be civilly understood to make him liable for such provisions as were granted in *liege poustie*, which the father could lawfully make, since he is not expressly burdened with any granted *in lecto* or *in articulo mortis*, which are as illegal as obligations extorted, or wanting writer's name and witnesses.

Replied for the pursuer; The bond of provision taking place against the defender by virtue of his own right qualified therewith, is not reducible *ex capite lecti*; especially considering, that, as it was in the defender's power to accept or repudiate the disposition; so moderate provisions to children are very favourable, and slender grounds of homologation have been sustained to infer the heir's consent, June 28, 1662, Dame Margaret Hay *contra* Seton of Barns, No 61. p. 3246.; and July 1666, Halyburton *contra* Halyburton, *voce* HOMOLOGATION; and the words, *etiam in articulo mortis*, are but sometimes adjoined *in majorem cautelam*.

Duplied for the defender; That all the favour of, and necessity for younger childrens provisions, could not move the Parliament 1672, to allow heritors to burden their estates on death-bed with three or four years rent for that effect, as tending to subvert the ancient families of the nation. There is also a difference betwixt a father disposing to his apparent heir, with the burden of debts

to be contracted on death-bed, and his disposing to a stranger, with such a burden, viz. that though the reserved faculty to burden might be effectual against a stranger, who could ascribe his possession to no other title, it cannot be effectual against the heir, who can repudiate the disposition and enter by a service; seeing *nemo cavere potest, ne leges in suo testamento habeant locum*. And the acceptance of the disposition with possession by virtue thereof, can be no homologation of the bond; because homologation is never extended to what the party did not know at that time, Tailfer *contra* Maxton, *voce* HOMOLOGATION. Neither doth homologation of an article in a writ, homologate others of a different nature, Primrose *contra* Dun, *IBIDEM*. Nor takes it place where the deed is ascribable to other causes, Barns *contra* Young, *IBIDEM*; and *ita est*, That the defender's acceptance of the disposition is ascribable to a design of possessing the estate with the legal burdens made in *liege pousie*. Which method he could hardly omit; seeing he could not serve heir to his father who died not last vest and seased. For the defender, when an infant, was infest upon the disposition by his father before his death; and he could not reduce an infestment in favours of himself, who was *alioqui successurus*.

THE LORDS found the defender's accepting and bruiking by, after his majority, a disposition with the burden and reservation of provisions made, or to be made, to the younger children, was a homologation of the bond pursued for; and excluded the reason of death-bed: Though it would not hinder the defender to found upon the nullities of wanting writer's name and witnesses, or other reasons of reduction, such as force or fear; and therefore decerned against him, as liable to pay.

Forbes, p. 93.

1705. December 13.

GILBERT LIVINGSTON *against* MARGARET MENZIES, and the HEIRS of LINE
OF SALTCOATS.

GILBERT LIVINGSTON serves himself nearest heir-male of George Livingston, last Laird of Saltcoats, who deceased in October 1704, and pursues a reduction of a bond of tailzie, made by the said George in favour of the said Margaret Menzies, his sister's daughter, as done *in lecto ægritudinis*; at least the substitutions, material clauses, and some marginal notes, being added a few days only before his death. *Alleged*, You have no title, right, nor interest to pursue this action, as heir-male, because the estate of Saltcoats, for many generations, was provided to heirs whatsoever; and this was never altered till George, in his contract of marriage with Beinston's daughter, in anno 1655; with consent of three of his curators, (being then minor), provided the estate to the heirs-male of the marriage; and failing of them, to his other heirs, passing by his daughters of that marriage; and upon which tailzie, Gilbert now founds his right;

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A person made a tailzie in favour of some others, failing heirs of his own body, but bearing this reserved faculty, 'that it should be lawful to him at any time during his life-time, to alter the said tailzie,' which *de facto*, he so far did, as to make a new tailzie on death-bed. The Lords

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found that he
might, on
death-bed,
annul the first
tailzie.

which tailzie cannot subsist in law, being done by a minor (though authorised) to the lesion and prejudice of his heirs-female, and contrary to the tenor of the old infeftments, which a minor could not alter; especially considering, that one of his three curators consenting was his own uncle, who, by bringing in himself after the heirs male of the marriage, was *auctor in rem suam*, and acting for himself, which a curator cannot do. *Answered*, The making a tailzie to heirs-male being for preservation of the surname, is a rational deed, and followed in most of the families in Scotland, and so may be lawfully done by a minor; and is no lesion, seeing there are competent tochers provided in the contract to the daughters; and he was legally authorised, *1mo*, Because Mr Patrick his uncle's concurring as one of the curators, was but a *spes remota*, and could be no temptation. *2do*, There are two others subscribing with him, which must be reputed a quorum, unless it be proven there were more curators; and Mr Patrick's joining with them signifies nothing, seeing *utile per inutile non vitiatur*; and by the common law, *l. ult. C. de integr. restitut. minor. is qui jure communi utitur, non potest videri circumventus; et l. 116. D. de reg. jur. ladi vel decipi non videtur qui jus publicum sequitur*. So he who makes a tailzie in his contract, conform to the laws of the land, cannot be reputed as liesed. *Replied*, Minors, with consent of their curators, may do all deeds of administration, but not what imports absolute dominion; but, to cut the line by a tailzie, is an alteration of the natural succession, and a donation, none of which is allowed to minors. THE LORDS considered this had been often debated, as in Nicolson's case, (*voce MINOR*), and others, if a minor can break a tailzie, or make a new one, and was never decided; therefore, they waved the point at this time, and proceeded to the other question in this debate, viz. *1mo*, If the said contract 1655 was prescribed, seeing neither infeftment nor any thing else had followed upon it by the space of fifty years? *Alleged*, That the heirs-male, till the case now existed, were *non valentes agere*, and against such no prescription runs. *Answered*, The obligation to perfect the right did immediately arise, though the other may change it at his pleasure. THE LORDS did not decide this, but generally thought it was not prescribed conform to the practise, Duke of Lauderdale *contra* Earl of Tweeddale, *voce* PRESCRIPTION. Then they proceeded to the third point, viz. the heir-male's reason of reduction of Alexander's disposition to George, his younger brother in 1680, whereby he alters the tailzie to the heirs-male made in his father's contract of marriage in 1655, and brings it back again to the former channel, and provides it to George's heirs whatsoever; which was, the said Alexander's fatuity and furiosity at that time, whereof a large condescendence was made, and so he could give no consent, nor legally break his father's tailzie; *et resolutio jure dantis, resolvitur et jus accipientis*. *Answered*, Though he had no great judgment, yet every weakness will not annul a deed, especially where it is so rationally done as this was, *in presentia amicorum*, his nearest friends being witnesses; and the *judicium centumvirale* at Rome sustained Tuditanus's testament, though notourly known

to be furious, in regard nothing of folly appeared in his will. And now to inquire *de statu defunctorum*, after so long a time, is *pessimi exempli*, and dangerous; and his brother, who only could quarrel it, never did it, but bruiked and possessed by it, though he had right *utroque jure*, both by the disposition, and *ab intestato*. Some of the Lords urged to have a trial before answer, by giving a mutual probation of his condition at that time; the one to prove madness, and the other lucid intervals; but the plurality repelled the reason of reduction, and sustained the disposition, whereby the lands returning again to heirs whatsoever, Gilbert's title as heir-male was cut off. See the 25th of July 1672, Gray*. Alexander's disposition to George was pleaded as equivalent to a special service as heir to Alexander, and an infeftment. But this notion was objected against as a strange sort of transubstantiation, by a substantial transfusion and change of one right to another of a quite different nature, which were to make accidents subsist without a subject, and implies a contradiction.

On the 1st February 1706, a protestation for remedy of law against this interlocutor, and those pronounced since, was given in for the said Gilbert Livingston.

1707. February 25.—GEORGE LIVINGSTON *contra* Mrs Margaret Menzies, in the competition mentioned *supra* for the estate of Saltcoats, the last Laird having, in August 1704, made a tailzie, failing heirs of his own body, in favours of James Aikenhead, son to Alexander Aikenhead writer; and failing him, to George Livingston his uncle; James the first institute being lately dead, George the next substitute claims the estate; against whom it was *alleged* for Mrs Menzies, that the tailzie founded on bore this express faculty of reservation, That it should be lawful for him, at any time during his lifetime, to innovate the said tailzie at his pleasure, and that *de facto* he had exercised this power, by making a new tailzie in favour of Mrs Menzies, his niece, and by writing on the back of Aitkenhead's and Livingston's tailzie, an express revocation, narrating his faculty, and declaring he had rescinded, voided and annulled it, except only to validate his tailzie of that date to Mrs Menzies. *Answered*, This reserved faculty being to alter and innovate only at any time in his life, must be understood *civiliter*, and not *judice*, and could only empower him to revoke it in *liege poustie*, when he was in health, and not by a deed on death-bed; where it was intended, that he might do it at any time, though *in agone mortis*, lawyers had invented a clause for it, viz. that it should be lawful for him to change, alter and innovate, *etiam in articulo mortis, et in lecto ægritudinis*; which words not being adjoined to this faculty, he could not revoke it, nor by a new tailzie alter and break it on death-bed, as it is acknowledged his posterior tailzie and revocation were, being on the 13th of October 1704, within a few days of which he died, and never went to kirk nor market, and had the diseases on him; whereas, at the signing of Aikenhead's and Livingston's tailzie, he was in perfect health, and had not contracted the disease whereof he died, but went

* Gray against Gray, *vide* FIAR.

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to kirk and market, and outlived sixty days after it, so that he satisfied both the ancient and recent laws of death-bed ; and it appears the Lords have made a distinction betwixt these two clauses ; for, where it bore only a power to alter during life, they found this could not be legally exercised on death-bed, unless the clause had also added these words, *etiam in articulo mortis*, and so it was decided, 25th February 1663, Hepburn of Humbie *contra* Hepburn, No 1. p. 3177. ; and though Stair observes, that the case was transacted betwixt the parties ; yet he adds, the LORDS thought their opinion agreeable to the terms of law. And the like was found, on the 24th July 1672, Cant *contra* Porterfield, No 2. p. 3179. ; and 22d June 1678, Birnie *contra* Polmaïs and Brown, No 58. p. 3242. ; and the law of death-bed is amongst the ancientest of our constitutions, and ought to be kept so inviolably sacred, as not to be touched without shaking the foundation of our securities, and l. 39. *D. de manum: testamento* : Liberty, though most favourable in itself, yet being conferred *in tempus inhabile*, when he ceases to be master, cannot be exercised ; because, *devenit in eum casum a quo incipere non potuit* ; even so here, Saltcoats *fecit quod non potuit, et non fecit quod potuit* ; and if the first clause ‘ of any time in his life,’ had been sufficient to authorise him to alter it on death-bed, our lawyer would never have excogitate that new clause and addition, *etiam in ipso mortis articulo*. And in a late case, Davidson *contra* Davidson, No 67. p. 3255. in 1688, the Lords did not so much as allow an alteration on death-bed, though contained in a charter under the Great Seal, *quia nemo ita cavere potest, ne leges in suo testamento locum habeant* ; nor can the King give a power to dispense with so public a law. Replied for Mrs Margaret Menzies, That, at the beginning, when tailzies were not fully understood, the Lords were strict in the interpretation of these words, ‘ at any time in his life ;’ but, by the current of decisions since that of Humbie in 1663, they have always extended these words to the tailzier’s whole natural life, *vita* being only *spiraminis fruitio, et morti opponitur* ; and l. 18. § 1. *D. de manumissis testamento*, says, *Cum moriar, liber esto, totum vitæ tempus complectitur*. And so it was found, 28th June 1662, Dame Margaret Hay *contra* Seaton, No 61. p. 3246. ; 22d June 1670, Douglas *contra* Douglas, No 6. p. 329. ; and in February 1686, and 1687, it was renewed, Brown *contra* Congalton, No 65. p. 3251. also No 66. p. 3253. ; and lately, on the 8th February 1706, Bertram and Kennedy *contra* Veir, No 68. p. 3258. And Lord Dirleton, in his Doubts and Questions, page 198, 199. explains LIFETIME, of a natural life, and that a man can qualify and burden his gift as he pleases ; and if you accept it, you must take it *cum onere*, and never quarrel it, whether done on death-bed, or not. THE LORDS, by plurality, found, that Saltcoats might, on death-bed, recal and annul Aitkenhead’s and Livingston’s tailzie ; though his faculty bore no more but the words, ‘ at any time in his life,’ and wanted the additional clause, *etiam in articulo mortis*, thinking them only exegetical, and an extension of style, for better clearing the sense, but did not find them necessary ; and that these words, ‘ any time in his life,’ were opposite to death, and not only to sickness and death-bed ; and that it was too restrictive a sense to interpret

them only of the state of health and *liege poustie*, or *legitima potestas*; but that they comprehended the tract of our whole natural life to the last moment thereof; though this exposed men in their greatest infirmities and weakness, both of body and mind, to be circumvened and imposed upon, they coming best speed at that time, who are nearest, and always about them when dying, craving it as a reward of their services and other officious flatteries; *potiores erunt qui tunc sunt moribundo propiores et presentiores.*

1707, June 17.—In the competition for the estate of Saltcoats betwixt George and Gilbert Livingstons as heirs male, and Mrs Menzies, his niece, as heir of tailzie, mentioned 25th February 1707,—The Lords having allowed a mutual probation, before answer, anent the last laird's condition when he made this tailzie, whether it was a free voluntary deed; or if he was imposed upon by undue solicitations and importunity, by fraudulent insinuations when he was *moribundus*;—Gilbert adduced two witnesses, viz. James Aikenhead, son to the writer to the signet, and Mr John Ogilvie, schoolmaster at Aberlady, against both whom Mrs Margaret made the following objections: *imo*, against Mr Aikenhead, that he was one of the members and substitute branches of the tailzie, and so could gain by supporting his own tailzie, and deponing against the other. *Answered*, He was named at a very remote distance, and many are placed before him; and to shew how unconcerned he was, he offers under his hand to renounce his hopes and apparenancy of succession. The Lords thought this offer very suspicious, especially in an estate tailzied under irritancies, where they cannot well renounce to the prejudice of their posterity; and therefore sustained the objection, and repelled the witness. The objection against Ogilvie, the second witness, was, that after his citation, he was heard say that the deceased Saltcoats was owing him some fees, and he would depone best for them that would pay him what was owing. There was little doubt as to the relevancy of the objection; but the question arose *de modo probandi*; and Mrs Menzies offered to prove by witnesses who heard him utter these words, and which should be the rather admitted that he was *mala fama*, and under no good repute? *Answered*, The emission of words, which may be easily mistaken, cannot be proven by witnesses; for, at this rate, there may be a *progressus in infinitum*; for as you reprobate my witness by witnesses, so I shall object against yours, and offer to prove by other witnesses; and so it shall never come to an end. *Replied*, This case being debated in the divorce pursued by Whitford of Milton's Lady, against Him, in 1671, the Lords allowed such objections to be proven by witnesses, and only required they should be *omni exceptione majores*. See *voce* WITNESS, and Sir George Mackenzie's pleadings, page 78.—but there a reprobator was expressly craved and reserved. The LORDS here refused to admit witnesses for proving this objection, but only sustained it by his oath; but to refresh and convince him, they allowed the witnesses to be present at his deponing, whether he had not that expression, which was an evident prodution and selling of his testimony, if he

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said so ; and therefore granted a diligence for citing them to be confronted with him.—See WITNESS.

December 31.—The case, mentioned 25th February and 17th June 1707, betwixt George Livingston and Mrs Margaret Menzies, about the estate of Saltcoats, was this day advised ; and the first point determined was about the cancellation of the sidescription of the first sheet of the first tailzie, which the last laird made in August 1704, in favours of James Aikenhead, and George Livingston ; and the second point was anent the import of his revocation wrote on the back of that tailzie in October thereafter, when he was on death-bed ; annulling it in so far as concerned the substitutes therein, except Mrs Menzies, his niece, and declaring it should stand good and subsist for supporting the said tailzie made in her favours. The first point stood thus : He was induced by Alexander Aikenhead to make a tailzie, wherein, after the heirs of his own body, James Aikenhead, son to the said Alexander, is next substitute ; then George Livingstone, his own uncle ; then Hamilton of Bardowie, a remote relation, and so forth, with this provision that it should have no effect during his lifetime, and that it should be lawful at any time during his life to alter, innovate, change or make the said tailzie void or null, whereanent a declaration under his hand should be a sufficient document. The rumour of this deed going abroad, many applied themselves to Saltcoats, and represented the unreasonableness of it, to pass by his two sisters and their heirs, and give away his estate to Mr Aikenhead, a remote friend. Upon this remonstrance, he did tear away his name from the first juncture of the sheets of the first tailzie, which bore the dispositive part, with the members of the tailzie, and a part of the lands, and left all the rest of it entire ; and afterwards by advice made a second tailzie in favours of Mrs Menzies, and wrote a revocation on the back of the first tailzie, with the reservation foresaid ; but both these were on death-bed. James Aikenhead, the first member of the first tailzie dying, George Livingston, the next immediate substitute, claims right ; against which both Mrs Margaret Menzies, and Mr James Bailie's wife, the other aunt, objected, *imo*, It was cancelled in the first sheet. *2do*, Was revocable, and *de facto* revoked. *Answered* for George, The tearing away the first sidescription, and the rest standing entire, can never annul that tailzie, unless it were clearly documented and instructed that he did it *eo animo* to make his succession devolve *ad hæredes suos ab intestato*, his aunts, which he never intended, having often declared they should never have a fur of his land, for they had both disoblged him ; and there is neither law nor fixed custom for sidescribing, so *esto* it had wanted all the sides, yet being subscribed at the bottom, it would have been valid and sufficient ; and though it is a laudable practice, that sheets may not be altered nor cut, and to prevent the putting in of new clauses, yet when the Lords made the act of sederunt, 8th July 1691, ordaining the margins to be subscribed, it only relates to judicial acts and diligences, but not to voluntary rights and con-

tracts, and so *casus omissus habetur dedita opera omissus*. And the act of parliament 1696 for writing decreets book-ways, and that each sheet be signed as margins use to be, imposes no necessity for subscribing margins, for *id non agebatur*, but only is mentioned *exempli gratia*. Next, if he had designed to cancel it, it would have been easy for him to have torn away the bottom and last sheets, which would have been the most effectual way, or to have scored his whole subscriptions, or cast it into the fire ; but he did nothing like a settled, composed, deliberate will of destroying it ; only being influenced and pushed ; he takes away the first, and here he bethinks himself and stands ; and the Roman law is very clear on this head, if there be any induction or deletion done *subito vel incaute*, it does not annul the deed *l. 12. l. 30. C. de testam. l. 1. § ult. C. de his quæ in testam. del.* where the *onus probandi* of the design lies on the impugner of the writ. *Replied*, Where a writ is still in the granter's hand undelivered, and never perfected by resignation or infeftment, any declaration of his mind and purpose to alter it is sufficient ; and what stronger evidence could he give than to rive away his subscription from the first sheet ; and so all the rest of the paper is a tail without a head, and can serve for no use, but to put tobacco in it. Yea, since they have appealed to the common law, even thither they shall go ; for the Romans were so nice, that if the very thread or string, the linen that tied the leaves of the testament together, was cut, the testator and seven witnesses subscriptions signified nothing, *l. 1. § penult. D. de bonor. possess. secundum tab.* This point being put to the vote, whether the partial cancellation of one of the sidescriptions only was sufficient to annul the first tailzie *per se* ? and the Lords being equally divided, six to six, the President, by his casting vote, found it was not sufficient *per se*. Then the Lords proceeded to the second point, whether Saltcoats could validly exerce the faculty and reserved power of altering, when he was upon death-bed ; and it was *alleged* for George Livingston, that he could not, for this would overturn that most excellent law, the origin whereof is so old that it cannot be traced back to its foundation. The first mention we have of it is in *Regiam Magistatem, lib. 2. cap. 18.* and all our lawyers, particularly Craig, p. 85. look on it as a sacred and inviolable corner stone ; and the reserving such a power to alter is contrary to law, *nam pactis privatorum nequit derogare jure publico*. Next, this clause does not bear a power to alter *etiam in articulo mortis* ; and so this faculty could only be exerceed, *in liegè poustie*, as was found 25th February 1663, Hepburn, No 1. p. 3177. *Answered*, for Mrs Bailie and Mrs Margaret Menzies ; that the law of death-bed was certainly a most excellent useful law, but cannot be so far extended as to restrain proprietors from reserving faculties to alter their settlement and succession, during any time in their life, where the deeds are rational.

But there are several cases here carefully to be distinguished, *imo*, Whether the deed be still in the granter's hand, or if it be a delivered evident. For in the first case, he may freely destroy it at his pleasure, though it had reserved no faculty to alter ; but where it is delivered, there is a greater *jus quæsitum* to the

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party, which cannot be taken away without a formal revocation. *2do*, It is to be considered whether the tailzie stands in the naked terms of a destination and bond of tailzie, without any thing following upon it, or if it be completed by resignation, charter, or seisin. In the first case, any declaration of his contrary will irritates and annuls. In the second, it requires more express deeds. *3tio*, A difference must be made betwixt bonds of tailzie in favours of the heirs of blood or the heirs in the investiture, and where they call remoter heirs, or strangers to the family. In the first case, law will not so easily annul and void such a tailzie; but where it is put out of the channel, law will easily yield to any intimation of the party's change of mind, to bring it back to the lineal succession. *4to*. We must distinguish whether the faculty of altering be exercised as a total eversion and annulation of the former tailzie, or be only a burden and clog laid upon it, as children's provisions, or other sums of money. In the first case, law will be more strict in adhering to the first deed, than it will be where it is only a burden on the substitute in the tailzied fee. Now, to apply these four distinctions to the case in hand: Saltcoat's first tailzie to Aikenhead was never delivered, nor ever perfected by infeftment; it was to strangers, and not the nearest in blood, and was but a partial revocation, preserving it still *quoad* Mrs Menzies's right; and this reconciles the seeming contrariety and clashing that appears in the cross decisions cited by either party; some of them reducing the deeds as *in lecto*, though they want the clause *etiam in articulo mortis*, others again sustaining them in respect of the reserved power to alter at any time in their life; such, as 28th June 1662, Seaton of Barns; No 61. p. 3246; February 1663, Hepburn, No 1. p. 3177; 26th June 1670, Douglas, No 8. p. 329; June 1672, Cant and Porterfield, No 2. p. 3179; February 1686 and 1687, Brown *against* Lady Keith, No 65. p. 3251; in 1678, Birny and Polmais, No 58. p. 3242; in 1688, Davidson's case, No 67. p. 3255, mentioned by Dirleton, p. 150; 8th February 1706, Bertram *contra* Weir, No 68. p. 3258; and Stair, *lib. 3. tit. 3. § 29.* and as to the *l. 55. de legat. 1.* that *no mo potest renunciare juri publico, nec providere ne legis in suo testamento locum habeant*, that brocard holds only where it is *jus utilitate publicum*, but not *in jure auctoritate publico*, as the law of death-bed is. THE LORDS, by a plurality of eight *contra* three or four, found the tailzie made to Aikenhead revocable even on death-bed, and actually so revoked, and therefore null *quoad* the substitutes therein, reserving still to consider if it could subsist to support Mrs Menzies's second tailzie, though the Lords inclined to think it null *in toto*, and that it could not both stand and fall in part, but did not decide it at this time. Yet there were sundry acts of importunity and insinuations proven for impetrating from him the second tailzie in her favours, and that he regreted to sundry, that he could not get leave to die in peace, till he did it. And though no force, violence, or threats were used, yet much practising made it uneasy to a sick dying man, who will do much to redeem his quiet at such a time. Yet the Lords did not think that these offering advice, or representing what was

most fit and honourable to his family, could be reputed undue solicitations. However, if both tailzies fall, the succession falls and devolves *ab intestato* to his two aunts equally between them.

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Fol. Dic. v. 1. p. 216. Fountainball. v. 2. p. 300. 352. 371. & 410.

* * Dalrymple reports the same case:

THE deceased George Livingston of Saltcoats, who died in the end of October 1704, having no issue, made a tailzie of his estate in August preceding, above sixty days before death, in favour of James Aikenhead, and the heirs male of his body; which failing, in favour of George Livingston of Midfield, and the heirs male of his body, and the other heirs therein mentioned; with a provision that the same should have no effect during his lifetime; and that it should be lawful to him, at any time during his lifetime, to alter, innovate, change, or make void, or burden the tailzie, and a clause dispensing with the not delivery.

James Aikenhead being a remote relation of a daughter of the family, several of the nearer relations having notice, did apply to him to alter; and accordingly he made a posterior tailzie some days before his death, in favour of Mrs Margaret Menzies, his eldest sister's only daughter, and to the other heirs therein mentioned; and also, by a holograph declaration on the back of the tailzie, revoked the same to all intents and purposes, except in so far as it should subsist as an obligation to denude in favour of Mrs Margaret Menzies, and the other heirs of tailzie mentioned in a disposition of the same date.

After his decease, James Aikenhead, the first institute, being also dead, George Livingston, the next heir of the first tailzie, raised a reduction of the second tailzie and revocation; Mrs Margaret Menzies raised a reduction and declarator in terms of the revocation; and Anna Livingston, one of the two sisters and heirs portioners, and her husband, raised a reduction of both first and second tailzie, and insisted on these reasons, *imo*, The first tailzie was cancelled in as far as George Livingston, the granter, determining to make a new tailzie, did tear away his name from the side-scription to the joining of the first and second sheet; which first sheet did contain the obligation on the granter, and did name and design the whole heirs of tailzie, and contained a great part of the procuratory, viz. the nomination of the procuratory and a good part of the lands; and the second sheet did contain the rest of the lands and the procuratory of resignation; so that the substance of the tailzie being cancelled, the whole became void; and the second tailzie upon death-bed, founded upon it, fell in consequence.

As to the matter of fact, there being a probation led, it was proven by Mr John Menzies advocate, that the defunct told him that he had torn away the first side-subscription, and accordingly he saw in his custody the tailzie and the piece torn away folded up with it. Cultraes and Mr John Menzies's servant

No 69. concurred that they saw the tailzie without the side-scription, and the piece torn away folded up with it at the opening of papers after the defunct's burial, and by ocular inspection it appeared to be so torn as could not have happened by chance, but *ex industria*.

It was *answered, imo*, The witnesses were Cambo, Mrs Margaret Menzies's uncle, Culteraes her half-brother, and her uncle's servant ; and her uncle's is a single testimony as to what the defunct spoke concerning the cancelling, and nothing could annul the deed except it had been done by the defunct himself with purpose to cancel it ; for if it had been done by any third party or chance, as long as the rest of the side-scriptions and subscriptions remained entire, the writ was good ; *2do*, The second sheet, which contains a good part of the procuratory and of the lands, and of the designation of the whole heirs, and the side-scription of the second and third sheet being entire, makes that sheet unquestionably authentic ; *3tio*, Though the other two witnesses depone that the tailzie was wrapped up in a paper sealed and quoted in the back not to be opened up till after his death, yet the back was not written nor signed by the defunct, nor sealed with his seal, and the Lady Waliford, Mrs Margaret's mother kept the key of the cabinet where it lay ; *4to*, No law requires side-scribing.

It was *replied, imo*, Mrs Margaret Menzies's relations are the most unsuspect witnesses in this point ; because the cancelling the first tailzie defeats the second, which was made on death-bed, and has no other foundation than the obligation on the heirs of the first to denude ; *2do*, There is no reason to suspect the paper could be cancelled by any but the defunct, being wrapped up in a sealed paper in the defunct's cabinet ; and though the key had been in his sister's custody, who gave over all right to her daughter, no body could have more interest to sustain the second tailzie by the first ; *3tio*, Side-scribing of all papers being so universally and long practised, and necessary for preventing of fraud, it is now a part of our law, and more especially since the act of Parliament 1696, for writing of contracts and other evidents book-ways.

' THE LORDS found the probation adduced not relevant to annul the tailzie.'

The said Anna Livingston *insisted* in the second reason of her reduction with concurrence of Mrs Margaret Menzies, viz. That the first tailzie was revoked by the second, and by a separate revocation on the back thereof as above mentioned, and that by virtue of the faculty contained in the first tailzie.

It was *alleged, imo*, The first tailzie was made *in liege poustie*, when men are only in capacity to dispose of their heritage, and what is then deliberately done cannot be revoked on death-bed ; for dying persons *præsumptione juris et de jure* are weak and unfit ; ' si quis in infirmitate positus in lecto terram suam distribuere cœperit quod in sanitate facere noluit, hoc potius ex fervore animi quam mentis deliberatione fecisse videtur,' Lib. 2. cap. 18. Majest. And in this case, the defunct never designed the succession to either of his sisters, or their issue, when he was in health ; and the pursuer is of his name and his blood,

being cousin-german and the heir male's brother ; 2do, The faculty reserved in this case does not so much as mention a power to exercise the same on death-bed, which would not be relevant though he did ; much less can such a general clause be further extended, than to a deliberate alteration or burdening in *liege poustie*, for lifetime in this case is a term contradistinct to death-bed, L. 2. cap. 18. of the Majesty, ' *Quamvis autem generaliter cuilibet liceat de terra sua rationabilem partem pro voluntate sua cuicunque voluerit in vita sua donare ; in extremis tamen agenti hoc nulli hactenus permissum est.*' And the decisions of the Lords do clear that such reservations cannot entitle a party to exercise a faculty on death-bed, as was found 25th February 1663, Hepburn of Humbie *contra* Hepburn, No 1. p. 3177. where the heir male reduced a disposition on death-bed, in favour of the disposer's only daughter and heir of line, albeit the ancient destination of the estate to the heirs of line had only been altered by the disposer's contract of marriage, which bore a faculty to alter at any time during life, but not *in articulo mortis*. The like 24th June 1672, Porterfield *contra* Cant, No 2. p. 3179. where a grand-mother having taken security to herself and her grand-children, with a faculty to alter at her pleasure, which she exercised on death-bed in favour of her son, who was her heir, yet the deed was reduced at the instance of her grand-children. And in the known case of Davidson *contra* Davidson, No 67. p. 3255. decided in the 1687, where a father acquired a right of lands in favour of himself in liferent, and his eldest son in fee, with a faculty to alter, sell, and dispoise at any time during his life, *ac etiam in articulo mortis* ; and having accordingly altered on death-bed by disposing in favours of his second son, yet the Lords found that the eldest could not be prejudged by a death-bed deed ; by all which it is clear, that the Lords decisions have not allowed the old and excellent law of death-bed to be eluded upon pretence of any such faculties or reservations which are not consistent with the law of death-bed. It is true, there were other decisions condescended on by the pursuer, where the Lords have sustained death-bed deeds ; but there is a clear distinction doth arise by observing the decisions on both sides, viz. That where the exercise of the faculty reserved on death-bed imports a total alteration, and doth wholly enervate the heir's right, there the Lords do not sustain the death-bed deed ; but again, where the exercise of the faculty is but a moderate burden upon the heir, consistent with the fee and succession, there the deeds are sustained.

It was *replied* for the pursuer, *imo*, In general, as to all the decisions, and the case stated in the Majesty, they relate to heirs in the investiture by public and solemn rights and deeds, which are of their nature more firm, and less to be touched on death-bed for the security of succession ; but here the first tailzie quarrelled was made in prejudice of the heir of the investiture, truly after his death-bed sickness, which was a decay, albeit in the construction of law it was in *liege poustie*, being 61 days before his death, and it was private, without the knowledge and advice of any of his friends, elicited by the writer of it, who

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inserted his own son as the first heir, being a remote relation, kept latent and always in the defunct's custody and power, and no infeftment ever followed upon it; and as he might have cancelled it, so he might alter, revoke or burden it with any deed signifying his pleasure; and if the challenging of any side-scription had been instructed to have been done with intention to have annulled it, the Lords would have reduced it on that single ground; 2do, Where rights are made in favour of the heirs of the investiture, with such faculties to burden on death-bed, such faculties do prove ineffectual, because the heir can repudiate such dispositions or tailzies, *et omissa causa testamenti succedere ab intestato*, which a stranger can never do; 3tio, There is no difference in law whether the faculty bear *etiam in articulo mortis*, or not, if it bear at any time during lifetime; for no man reserving such a faculty can be presumed to restrict it to health, and more especially in this case, where the provision runs in these terms, that the deed should have no effect during his lifetime, and that it should be lawful for him at any time during his lifetime, &c.; where *lifetime* being twice expressed in the clause, it must have the same signification in both, and in the first part, it is capable of no other construction than to the last moment *inclusive*.

4to, As to the particular decisions, that of Humby's was transacted before, as the decision mentions, and the heir male's right was constituted by a public and solemn contract of marriage; and that of Porterfield did only bear *revocable during pleasure*, and neither mentions lifetime nor death-bed; and Davidson was a case where the alteration was in prejudice of the heir male and of line on death-bed; in which, nevertheless, the Lords were much divided, because the fee had been taken originally to the eldest son, with a faculty to the father to alter; so he was to be considered as a stranger heir, who could not succeed but by tailzie, nor quarrel the conditions and faculties of it; but as such a deed in favour of the eldest son would have made him heir passive *per praeceptionem*, so it is to be considered *per fictionem brevis manus*, as if the father had acquired the right originally to himself, and disposed to the son, and the son and heir was allowed to quarrel.

5to, There are many decisions which favour the pursuer, and especially all that have occurred of late, 26th June 1662, Dame Margaret Hay *contra* Seton of Barns, No 66. p. 3253.; 22d June 1670, Douglas *contra* Douglas, No 6. p. 329.; February 1686, Brown *contra* Congleton, No 65. p. 3251.; February, 1687, Lady Keith *contra* Congleton, No 66. p. 3253.; 18th February 1706, Bertram of Nisbet *contra* Weir of Stonebyres, No 68. p. 3258. in which last case the heir male and of line was found liable to the burden of provisions on death-bed, because he had not entered *ab intestato*, but possessed by virtue of a right bearing power to burden at any time during life, and did not bear *in articulo mortis*.

THE LORDS found the first tailzie revocable and revoked, but did not determine whether the revocation on death-bed should only annul the tailzie and leave the succession to descend *ab intestato*, or if the said revocation of the

tailzie would also convey the right of succession to Mrs Margaret Menzies and the other heirs mentioned in the revocation and second tailzie.

Dalrymple, No 86. p. 109.

* * * This case is also reported by Forbes :

GEORGE LIVINGSTON of Saltcoats, having a matter of three months before his death, tailzied his estate, passing by the Lady of Waliford and Anna Livingston, spouse to Mr James Bailie, his two sisters, in favour of James Aikenhead, and the heirs of his body ; which failing, to George Livingston of Midfield, &c. with a reserved power and faculty to alter at any time in his life, by a declaration under his hand ; did sometime after tear away his name and side-scription from the margin joining the first and second sheets of that tailzie, in which first sheet the obligation to resign, procuratory of resignation and lands were contained ; and upon death-bed made a new tailzie to Mrs Margaret Menzies his neice, and her substitutes ; and of the same date, wrote a holograph declaration upon the back of the first tailzie, whereby he revoked and annulled it, except in so far as concerned the faculty therein to alter, which he would have subsist for supporting the second tailzie. After Aikenhead's decease, there arose a triple competition betwixt George Livingston the next substitute in the first tailzie, Mrs Menzies and Mrs Bailie, the defunct's sister.—Mrs Bailie *alleged*, That the taking of the side-scription from the first tailzie did annul the same *in toto* ; and that the second tailzie, granted on death-bed, could not subsist in prejudice of her one of the heirs of line, notwithstanding the defunct's exercising the faculty reserved in the first tailzie, by his declaration on the back thereof.

Mrs Menzies *pleaded*, That the cancellation might both concur to strike out George Livingston, and be effectual to validate the tailzie in her favour, according to the holograph declaration.

Alleged for George Livingston, *1mo*, The tearing the marginal side-scription from the first sheet of the first tailzie, doth not annul the same, nor derogate therefrom in the least ; because, *1mo*, No law or fixed custom requires side-scribing of obligatory writs, as an indispensable solemnity ; in evidence whereof, the Lords made an act of sederunt for the side-scribing of decreets, inhibitions, and other diligences, without mention of private voluntary rights ; and *casus omissus habetur pro omisso*. Nor can the tearing one marginal side-scription be interpreted to annul the writ, where all the rest are entire, and the subsequent sheets have an inseparable connection with the first ; and the obligation to resign, procuratory, and lands, fell to be in the first sheet only from the accidental closeness of the write ; *2do*, Taking away one of the side-scriptions could not evacuate or prejudice the tailzie, unless it were clearly instructed to have been done by the defunct *eo animo*, that his succession might go to heirs *ab intestato*, which is not done ; on the contrary, in token that notwithstanding

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ing thereof, he considered the first tailzie as valid, he signed a revocation thereof several days after the cancellation; and further, declared it to subsist for a particular effect; which distinction betwixt a deliberate and casual cancelling of writs is authorised in the common law, *L. 12. and L. 30. C. de Testam. L. 1. pr. et § 1. L. ult in Fine ff. de his quæ in test. del.*

Answered for Mrs Bailie; (For Mrs Menzies seemed not very solicitous to debate this point,) *1mo*, It is the constant and uniform practice with us to side-scribe writs consisting of different sheets, for securing against fraud by substituting one battered sheet in place of another in different terms; and custom prevails as law, in matter of form, as well as in point of right; *2do*, Whatever might have been said before the act of Parliament 1696, appointing every page of securities written book-ways to be signed, as the margins were before; it cannot be pretended that side-scribing is a matter of indifference since that act, which equalleth the side-scription to the page subscription; and the first tailzie was framed long after the said statute; *3tio*, There is a great difference betwixt a writ not side-scribed from the beginning, and the taking away a side-scription once adhibited, which certainly inferreth a design to invalidate the writ; *4to*, Accidental cancellation is not to be presumed, but must be proved by the asserter; and if the taking away of that which joined the leaves of a testament among the Romans, did annul it, notwithstanding of the remaining subscriptions, and seals of the testator and seven witnesses, *L. 1. § pen. ff. de bon. poss. sec. Tab.*; much more must the taking away side-scriptions with us at so material a part of the writ, be sustained sufficient to annul the same.

It was further *alleged* for George Livingston; That Saltcoats had no power to revoke and cancel the first tailzie upon death-bed; for the reserved faculty to alter must be understood civilly *in terminis juris*, and could not be exercised on death-bed; unless at least the words *etiam in articulo mortis*, or *in lecto agritudinis* had been added, which are not in the said reservation. The reason of the law of death-bed, viz. That persons in a weak and dying state might not be imposed on by the importunity and influence of those about them, to do things they would abhor in perfect health, or be distracted or diverted thereby from the main work of preparing themselves for their last change, takes place as well in the case of such a faculty reserved in *liege poustie*, as where there is no such reservation at all; and this death-bed tailzie in favour of Mrs Menzies, was contrary to what the defunct intended when he was in perfect health; *3tio*, A reserved power, conferred *in tempus inhabile*, cannot be then exercised, *L. 39. ff. de Manumiss. Testam. quia devenit in casum a quo incipere non potuit*; so that though the reservation had born an express faculty to alter upon death-bed, the faculty could not have been exercised *in lecto*, since *pactis privatorum non derogatur juri communi*; and far less should we presume that a person designed to impinge upon the common law, where the words of the clause are not express; *4to*, It is clear from the current of decisions, that the defunct could not, upon death-bed, innovate the first tailzie, by virtue of the reserved power to alter at

any time during life, 25th February 1663, Hepburn of Humby *contra* Hepburn, No 1. p. 3177.; 14th July 1672, Porterfield *contra* Cant, No 1. p. 3179.; 22d June 1678, Birnies *contra* L. of Polmais, No 58. p. 3242.; and in the year 1687, Davidson *contra* Davidson, No 67. p. 3255. cited in the 150th page of Dirleton's Doubts; 5to, The note upon the back of the first tailzie, whereby the defunct annuls the same, except as to the reserved faculty, cannot be sustained as a revocation; because it implies a contradiction, to declare the tailzie null, and to subsist for the supporting of another tailzie; for one and the same writ cannot subsist as to one part, and be null as to another.

Answered for Mrs Margaret Menzies; Males have indeed successively of a long time enjoyed the estate of Saltcoats; but by investitures in favour of heirs whatsoever, and so not as heirs male but as heirs of line. The granter's power to alter the first tailzie on death-bed, is not only clear from the reserved faculty whereby it was to have no effect during his lifetime, and he was empowered to innovate and make it void at any time in his life; but also from this circumstance, that the disposition was never completed or delivered to the heirs of tailzie, but remained in the custody of the granter till his death; so that it was in his power to have burnt or destroyed it, and consequently he might alter; since *qui potest plus, potest minus*; nor is a reserved power to alter contrary to law, which only allows the quarrelling of such rights as are made without consent of the heir; whereas the heir, accepting of a disposition with a quality of this nature, is understood to consent thereto. The old law of the Majesty, and statutes of King William are not disputed, as to the case of death-bed; but these, as to the question in hand, how far lifetime includes death-bed, are as little pertinent as any part of Wallace's book. Nor are the ancient feudal constitutions to this purpose: The words *during life* do in grammar and law include every moment of life, and are contradistinct to death; as death-bed is to *liege poustie*; for, as lawyers observe, *momentum mortis vitæ annumeratur*; and *vita est spiraminis fruitio, et mortis opponitur*; 2do, If people on death-bed are under a natural incapacity to dispose, upon the account of weakness and want of judgement, then how comes it that they can make testaments, and dispose of vast moveable sums? 3tio, The general story that the faculty is *collata in tempus inhabile*, is a begging of the question; for the only subject of debate here is, if a faculty contained in a writ in *liege poustie*, can be exercised on death-bed; and though such reservations were not at first currently received, they are now become ordinary clauses in tailzies. The difficulty, if men could provide *ne leges in suo testamento valeant*, or by a reserved faculty prejudice the law of death-bed, is now quite over, and it is no longer doubted but they may; 4to, This opinion is confirmed by decisions, 22d June 1670, Douglas of Lumsden *contra* Douglas, No 6. p. 329.; 28th June 1662, Dame Margaret Hay *contra* Seaton of Barns, No 61. p. 3246.; in both which practics, the faculty was exercised in prejudice of the heir of line; whereas here it is exercised in favour of the only daughter of the eldest heir female, who by the tenor of the ancient infeftments

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would fall to be heir portioner of line. There are likewise other decisions to this purpose, February 1686, Brown *contra* Congleton, No 65. p. 3251.; February 1687, Lady Keith *contra* Congleton, No 66. p. 3253.; 8th February 1706, Bertram of Nisbet *contra* Weir of Stonebyers, No 68. p. 3258. As to the decisions adduced for Mr Livingston, they may be easily taken off; for that of Humby *contra* Hepburn was transacted; and in the case of Porterfield and Cant, there was no such reserved faculty as here; nor was the disposition in that of Birnies *contra* Polmais completed till after the contracting of death-bed sickness; and it is easy to discover that my Lord Dirleton, who observes the practise of Davidson *contra* Davidson, was of a different opinion; 5to, The allegiance upon the inconsistency and ineffectualness of the note indorsed upon the tailzie, is *jus tertii* to Mr Livingston, who has no benefit if the tailzie fall *in toto*; but then what hinders a tailzie to be altered in whole or in part, or to be declared void as to one clause and to subsist as to another?

Replied for Livingston; All the decisions adduced in derogation of the excellent law of death-bed, are to be strictly interpreted, and considered only as privileges indulged in favourable cases; such as the burdening heritage upon death-bed with provisions in favours of relicts and children, or the doing of deeds consented to, or homologated by the heir. Again, there is a difference to be put betwixt burdening the estate on death-bed, and altering the succession from its natural channel; and there is a difference betwixt faculties consistent with the existence of the right, and those inconsistent with it, as that before us, whereby the first tailzie is pretended to be quite evacuated.

Duplied for Mrs Menzies; The distinction betwixt burdening estates on death-bed in favours of wives and children, and the burdening them in favours of strangers, and the difference of burdening an estate with debts, from the alteration of the course of succession, are altogether groundless and arbitrary; seeing, if the matter be decided by the law of death-bed, all alienations, whether to children or strangers, and any diminution of the heritage, as well as alteration of the course of succession are reprobated; for there are no degrees in things forbidden as to the effect of nullity, all is null that is done *lege prohibente*. Again, it were of dangerous consequence to distinguish upon the favourableness of cases, except where favour has an express and clear rule in law for it: The pretences of specialities and favour being more pernicious to the course of law, than any other art or pretence whatsoever.

Albeit Mrs Menzies and Mrs Baillie concurred in their pleading to support the faculty of altering on death-bed, yet they differed in this, Mrs Baillie contended that the quality in the revocation of the first tailzie, is not relevant to sustain it for conveying the right of succession by the second tailzie to Mrs Menzies, in prejudice of the defunct's heirs of line.—To Mrs Menzies *answered*, That the heirs of line cannot plead the benefit of the revocation, which must be taken with this quality in favour of the second tailzie; for such a qua-

lified revocation on death-bed hath been sustained as effectual in our law, 25th January 1677, *Ker contra Kers*, No 64. p. 3248.

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THE LORDS found, That the first tailzie was not annulled by the cancelling of Saltecoat's side-scription from the joining of the first and second sheets thereof; but was revocable, and revoked on death-bed, by the revocation on the back thereof; and found, that the quality in the revocation is not relevant to sustain the first tailzie, for supporting the second, and conveying thereby the right of succession in favour of Mrs Margaret Menzies; and therefore reduced both tailzies, and declared in favour of Mrs Baillic, one of the heirs of line.

Forbes, p. 226.

1740. *January 16.* JOHN M'KEAN *against* ELSPETH RUSSEL.

JAMES M'KEAN being creditor to Sir Hary Innes in a bond for 2000 merks, payable to himself if in life, and, after his decease, to certain other persons, containing a power to James, at any time in his life, to uplift, receive, and discharge the same, without consent of the persons whose names were therein mentioned, did, on death-bed, exerce this faculty, and gave it away, not only from the heirs at law, but likewise from the substitutes.

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In a reduction on the head of death-bed, it was *pleaded* for the heir at law, That the death-bed deed did evacuate the substitution, whereby there came to be place for him; and though with the same breath the subject is given away to strangers, the alienation could not be effectual against him, being done on death-bed.

THE LORDS repelled the reason of reduction.

Fol. Dic. v. 3. p. 172. C. Home, No 140. p. 240.

1755. *February 11.*

DAUGHTERS OF WILLIAM LORD FORBES, and their HUSBANDS, *against* JAMES LORD FORBES.

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By contract of marriage betwixt William Lord Forbes and Derothy Dale his promised spouse, executed at London September 1720, he became bound to provide his land estate to the heirs male of the marriage; whom failing, to his other heirs male. And, as by this contract the Lord Forbes put himself and his heirs under a limitation not to alter the order of succession, nor even to contract debt in prejudice of the heir male of the marriage, it was thought reasonable to reserve a power for providing the younger children, which was done in the following words: ' That in case there shall be an heir male of the intended marriage, and one or more younger children, it shall be lawful for the said Lord Forbes, at any time in his life, *ac etiam in articulo mortis*, to make such

It was found by the Court of Session, that notwithstanding of a reserved faculty of making provisions to a certain extent to younger children, the defunct could not prejudice his heir, by provisions made on death-bed.

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But on appeal, this judgment was reversed, because the reserved power was in a contract of marriage, and so binding on the heir.

‘ provisions to the said younger child or children as he shall think fit; and there-
 ‘ with to affect and burden the foresaid lands and estate, provided the same do
 ‘ not in whole exceed the sum of L. 3000 Sterling, to be divided as Lord For-
 ‘ bes shall direct. And in case Lord Forbes shall die without making such pro-
 ‘ vision, or shall not charge the estate with the whole sum of L. 3000 Sterling
 ‘ for that purpose, it shall then be lawful for the said Dorothy Dale surviving,
 ‘ to charge the estate with the said sum of L. 3000, or such part thereof as shall
 ‘ not be charged by the said Lord Forbes; to be proportioned among the
 ‘ younger children as she shall think fit.’

The marriage dissolved by the death of Lord Forbes in the year 1730, leaving a son and three daughters. While he was upon death-bed, though perfectly sound in his judgment, he executed a bond of provision to his three daughters for L. 2000 Sterling, payable at the first term after majority or marriage, with interest from his decease, ‘ Declaring, that in case of the decease of
 ‘ any of his daughters before the term of payment, her provision should return
 ‘ to his son and heir; whom failing, to the surviving daughters.’ The son died under age, without being entered; by which the succession to the land estate, provided as aforesaid to heirs male, opened to James, the present Lord Forbes, his uncle.

In the year 1753, an action was brought against the present Lord Forbes by two of his brother's daughters, only now surviving, for payment of the above-mentioned L. 2000, contained in the bond of provision granted to them by their father. The bond was objected to, as granted upon death-bed; and as the defender had taken up the succession, and subjected himself to the debts upon the faith of a transaction made with the mother, which would have made matters pretty easy could she have bound her daughters, there was no avoiding listening to the objection with some degree of favour. It was understood that this claim of L. 2000, with interest from the 1730, would, with the other debts, do more than exhaust the estate; and to this natural, perhaps honest prepossession, more than to the point of law, I ascribe the interlocutor sustaining the defence of death-bed, and assailing the defender.

I have chosen, however, to mark the decision, in order to set forth what occurred to me upon the point of law; which may be useful in other cases, where the influence of favour is less.

In the *first* place I urge, Why ought not a provision to children be effectual though on death-bed, when a provision to a wife in the same circumstances is effectual? Can the heir qualify any just or legal prejudice by a deed, to grant which his predecessor is bound in conscience and by the law of nature? *2do*, A man on death-bed may adjudge for payment of moveable debts due to him; or he may take an heritable bond; both of which are prejudicial to the legitim. Strange that he can hurt the younger children on death-bed; and yet be barred from doing them common justice! Further, he may on death-bed charge

for payment of an heritable bond, which is indirectly providing for his younger children ; strange that he cannot do this directly !

So far in general. I now apply myself more particularly to the circumstances of this case. If a man, wanting to get free of the restraint of death-bed, shall take his heir bound before hand to ratify any deed that he shall grant even upon death-bed ; such a transaction, which has no other intendment but to evade the law of deathbed, ought not to be countenanced. For the same reason, if a man dispoise his estate to his heir *alioqui successurus*, reserving power to alter *in articulo mortis*, such a deed will not be more effectual than the former.

A deed done to benefit the heir is in a very different case ; as for example, where a proprietor of a land-estate makes a regular entail, limiting himself not to alter the order of succession, not to alienate, and not to contract debt above a certain sum. In this case, the heir who is benefited by the deed cannot quarrel the contracting of debt within the extent mentioned, even supposing more or less of the debt to have been contracted upon death-bed. This proceeds from the very nature of the law of death-bed. It is the privilege of the heir, that the predecessor cannot hurt him by any deed done on death-bed. But in the case supposed, the heir is not hurt. The entail is certainly not a prejudice to the heir : On the contrary, it is greatly beneficial to him. And if so, no deed done in terms of the entail, and in pursuance thereof, can be qualified to be prejudicial to the heir. It will be observed, that I lay no weight upon the circumstance of reserving power to contract debt upon death-bed. Such a clause is in itself good for nothing ; because no man merely by his own will can free himself from limitations imposed upon him by law. The argument proceeds, not upon a declaration of will, but upon the nature of the deed ; which, upon the whole, taking in all circumstances, is beneficial to the heir.

The case supposed approaches near to the real case. William Lord Forbes, limited himself by an entail in favour of the issue-male of the marriage, not to alter the order of succession, nor to contract debt above the sum of L. 3000. This deed was extremely beneficial to the heir-male of the marriage, who therefore could not quarrel the provisions made to his sisters within the L. 3000, though granted upon death-bed. It is true, the same limitations were not extended in favour of the present Lord Forbes. But then it will scarce be maintained that these provisions, effectual against the immediate heir, can be challenged after his death by the next heir.

To illustrate this argument, let us suppose William Lord Forbes had left L. 10,000 of a moveable estate, this estate would have descended wholly to the heir ; because the daughters were cut out of their legitim by the bond of provision, whether they were willing to accept of it or not ; according to the decision that a legitim may be excluded in a contract of marriage. This shews the palpable injustice of the objection of death-bed. The heir takes the advantage of this bond of provision, when it is his interest to bar the younger

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children from their legitim; and yet this bond is not good against him, if he find it his interest to reduce it as upon death-bed. This would be unjust and iniquitous. If the bond be good for the heir, it ought to be good against him.

In the next place, I consider this case in a different view. If, in a marriage contract, a certain sum is provided for the younger children, this provision must in all events be good against the heir. But then there is an apparent inconvenience in such a settlement, by making the children independent of their parents. This inconvenience is remedied by converting the burden into a faculty. Therefore when such a thing is done in a contract of marriage, it must, from the situation of the parties, be considered as done merely in this view, and not to afford any advantage to the heir. With regard to him it ought still to be considered as a burden, and consequently that he cannot object to the modification, though upon death-bed. And the great anxiety shewn to make the whole or part of this sum effectual to the children in all events, confirms this construction; a faculty being given to the mother to modify the provisions, in case it should be neglected by the father. What then is the consequence of finding that a faculty in this case cannot be exercised on death-bed? Plainly this, to oblige parties in their contracts of marriage to make direct provisions for their children, notwithstanding the inconvenience of making them independent—hurtful to parents and children, without producing any good to the heir.

I add, that this construction of a faculty to provide younger children is not a novelty in our practice, witness the following decision. ‘A father having disposed his estate to his eldest son in his contract of marriage, reserving to himself a power to burden the estate with a certain sum for provisions to his younger children; this very clause was found to produce action to the younger children against their brother, though the father died without exercising the faculty; 15th February 1673, *Graham contra Morphey, voce FACULTY.*’ This decision is evidently founded upon the above principle. With regard to the heir the provision is considered as a burden, to which he must be subjected, though the father should make no deed in consequence. But with regard to younger children, it is only considered as a faculty so far as to give the father power, within the sum mentioned, to give them more or less at his pleasure.

3thio, What in my apprehension cuts down entirely in this case the heir’s privilege of death-bed, is the faculty bestowed upon the relict to burden the estate with L. 3000 for the younger children, in case the father should neglect to exercise the faculty. Hence it appears to me extremely clear, that the heir cannot qualify any prejudice by the bond of provision for L. 2000, executed by the father on death-bed. On the contrary, it was directly beneficial to the heir, by depriving the mother of her faculty of burdening the estate to the extent of L. 3000.

This judgment was accordingly reversed in the House of Lords.

Fol. Dic. v. 3. p. 172. Sel. Dec. No 83. p. 108.

* * The same case is reported in the Faculty Collection.

By marriage-articles, dated 3d September 1720. entered into betwixt William Lord Forbes and Dorothy Dale, father and mother to the pursuers; William Lord Forbes settled his estate in favour of himself, and the said Dorothy Dale, and longest liver, in liferent; and of the heir-male of the marriage in fee; whom failing, in favour of his other heirs-male whatsoever, under prohibitive and irritant clauses, against contracting of debt, or altering the order of succession; and the articles contain the power and faculty following:

‘ That in case there be an heir-male of the said intended marriage, and one or more younger children, that then, and in that case, it shall and may be lawful to and for the said Lord Forbes, at any time in his life, *ac etiam in articulo mortis*, to make such provisions for his said younger child, or children, as he shall think fit; and therewith to affect and burden the foresaid lands and estate, providing the same do not exceed, in whole, the sum of L. 3000 Sterling, to be divided and proportioned amongst the said younger child, or children, as the said Lord Forbes shall direct and appoint: And, in case the said Lord Forbes shall die, without making any provisions for such younger child, or children, as he shall then have, or shall not charge the estate with the whole sum of L. 3000, for that purpose; then, and in either of these cases, it shall and may be lawful for the said Dorothy Dale, if she survive the said Lord Forbes, to charge the said estate with the said sum of L. 3000; or such part thereof, as shall not be charged by the said Lord Forbes, to be paid to such younger child, or children, and in such proportions as she shall think fit.’

There was issue of this marriage, one son, Francis, and three daughters, Mary, Jean Maria, and Elizabeth; and, in June 1730, Lord Forbes, when on death-bed, granted a bond of provision in favour of his daughters; whereby he obliged himself, his heirs and successors, to pay certain sums of money to them, amounting, in whole, to the sum of L. 2000, at their respective marriages or majorities, with annualrent, from the first term of Whitsunday or Martinmas after his decease. The bond provides, That, in case of the decease of any of the daughters, their share shall return to his son Francis; and, in case of his decease, he substituted the daughters to each other.

William Lord Forbes died a few days after executing of this bond of provision; and, some years thereafter, his said son Francis, and Mary his eldest daughter, also died; and James Forbes, brother to William Lord Forbes, succeeded to the honours and estate of Forbes.

Jean Maria, and Elizabeth, and their husbands, brought a process against James Lord Forbes, for payment of the principal sum due to them by their father's bond of provision, and for the annualrents thereof, from Martinmas 1730, being the first term after his death.

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The defender *pleaded*, by way of defence, against payment of the annual-rents which had become due betwixt the term of Martinmas 1730 and their respective marriages, That the bond could not be effectual against him, the heir; because granted by William Lord Forbes when on death-bed; but he did not plead this defence against payment of the principal sum and annual-rents, since the respective marriages of the pursuers; because the pursuer's mother, the Lady Dowager of Forbes, had discharged the defender of claims much greater than the said principal sum and annual-rents from her daughters' marriages; which claims were to revive, if the defender made any objection against payment of the said principal sum and annual-rents.

Answered for the pursuer: 1st, That the law of death-bed does not strike against deeds done in implement of prior obligations; and there can be no obligation stronger on a man, than that of providing for his children: nor is this obligation merely moral, it is also legal; for it has frequently been found by this Court, That the heir is obliged to aliment the daughters, or other children of the deceased, who are not in a capacity to support themselves; and these decisions are founded on this principle, That there was a legal obligation upon the father to provide for, or aliment his children, after his death; which, upon his failure, becomes effectual against his representative.

2dly, Whatever may be the case, in general, with respect to provisions granted by a father on death-bed to his younger children, yet the law of death-bed cannot affect the provisions pursued for; because, *imo*, by the marriage-articles above mentioned, Lord Forbes reserved a power to himself, at any time in his life, *et etiam in articulo mortis*, to burden his heir with an sum in favour of his younger children, not exceeding L. 3000; and the granting the bond of provision pursued on, was an exercise of that power or faculty. The sum of L. 3000 is to be considered as set apart for the younger children at the time of the marriage: but, as it was improper to make them independent on their father, special provisions were not made for them in the event of their being one, two, or more; but the provision was conceived in the form of a power or faculty granted to the father, of giving them provisions to the extent of L. 3000; which faculty might lawfully be exercised at any time.

3do, It has frequently been decided by this Court, That when one settles his estate upon a stranger, under certain conditions and faculties to be exercised on death-bed, the stranger cannot plead the law of death-bed against the exercising of these faculties; because such was the condition of the grant under which the stranger takes. And, in the present case, the defender may be considered as a stranger; for when William Lord Forbes entered into the marriage-articles, he enjoyed the estate of Forbes without any limitations, and might have settled it on whomsoever he pleased, and might have given it to his daughters, his heirs of line, preferably to the defender; but he settled the estate on the heirs-male, under the express condition of his having a power to burden it to a certain extent, *etiam in articulo mortis*: under this condition it comes to the de-

fender ; and therefore he must either take it under the condition, or repudiate it altogether.

3^{tio}, Even where one disposes his estate to him who is *alioque successurus*, under certain reserved powers and faculties, to be exercised by the disponent at any time, *etiam in articulo mortis*, the heir will be subjected to the burdens imposed by the disponent on death-bed, in virtue of the reserved powers, if it appears, as it plainly does in the present case, that the disposition was not made, and the powers reserved in order to elude the law of death-bed ; and this must undoubtedly obtain, if the heir accepts of the disposition, and possess by virtue of it, as has frequently been decided ; particularly, Hay against Seton, No 61. p. 3246. ; Douglas against Douglas, No 6. p. 329. ; Bertram against Weir, No 68. p. 3258. And although the defender has made up his titles to the estate by a service as heir-male, and not by the procuratory contained in the contract of marriage, yet he must be presumed to have taken it by virtue of the settlement contained in the said marriage-contract ; for, as William Lord Forbes had full power to make the tailzie with the prohibitory and irritant clauses contained in the said marriage-contract, the defender was not at liberty to repudiate that settlement, and to take the estate upon the former investitures in favour of the heir-male ; as was decided in the case Turnbull against Kinrier, *voce* TAILZIE ; and in the case of Lord Strathnaver against the Duke of Douglas, 2d February 1728, *voce* TAILZIE.

• *Replied* for the defender : That although it be the duty of every man to provide for his children, yet he ought to do so *debito tempore*, and not when he is *moribundus* ; for the law of death-bed strikes against every deed done by a person when on death-bed to the prejudice of his heir, without distinguishing whether the deed be gratuitous, rational, or onerous. ‘ Craig, lib. 1. dieg. 12.

‘ § 36. Sunt etiam qui ratione temporis in feudum concedere non possunt ; veluti, si quis in lecto ægritudinis sit constitutus ; quæ tempore neque alienare res hæreditarias, neque immobiles, neque obligare se, aut contrahendo, aut debitum agnoscendo potest, unde hæreditas, aut ejus pars successorii decedat.’ After a person comes to be on death-bed, *civiliter pro mortuo habetur*, as Dirleton observes, p. 186, so far as concerns his power of burdening his heritage ; and therefore he cannot burden it with provisions to his younger children ; and it has uniformly been so decided by this Court as often as the question has occurred ; particularly, Lord Cranston Riddell against Richardson, No 35. p. 3212. ; Fowlis of Collington against Fowlis, No 46. p. 3223. ; and Strachan’s Creditors against Elizabeth Strachan, No 50. p. 3227. Were it otherwise, no heir could be safe where his predecessor had younger children or daughters, about him at the time of his sickness, who could easily elicit from him, when *moribundus*, such provisions as they thought proper ; and to deliver dying persons from such solicitations, was one great design of the law of death-bed.

And as in general one cannot on death-bed burden his heir with provisions to his younger children ; so the bond pursued on cannot be supported by the pow-

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er or faculty reserved to the pursuer's father in his contract of marriage; for that the defender cannot be considered as a stranger who could only take under the disposition, and therefore could not object to the conditions of the deed; for the investitures stood in favour of heirs-male; and the defender was the heir of the investiture. And it is certain, that one cannot, by any deed in favour of his heir, create a power to himself to alienate or burden his heritage on death-bed; for it is a rule in law and reason, *Nemo potest cavere ne leges in testamento suo locum habeant*: and the Court has uniformly decided agreeably to this rule; particularly, Hepburn of Humbie against Helen Hepburn, No 1. p. 3177.; January 1734, George Ballantyne against William Ballantyne.* In the cases mentioned for the pursuers, the heirs had homologated the settlements made by their predecessors reserving the power to dispoise and burden on death-bed; but in the present case, the defender never homologated the settlement made by the pursuer's father, having made up his titles by service as heir of the investitures, and not upon the procuratory contained in the contract of marriage. And although, notwithstanding thereof, he may be bound by the prohibitive and irritant clauses which the late Lord Forbes had power to impose, yet he cannot be bound by any of the conditions which are reprobated by law.

'THE LORDS sustained the defence of death-bed relevant to assoilzie the defender from the claim of annualrents made by the pursuers upon their bond of provision previous to their respective majorities or marriages.'

Act. Advocatus, And. Pringle, Ja. Dundas, et Bruce.

Alt. Ferguson, Lockhart, Burnet, et Grant.

Clerk, Kirkpatrick.

Fac. Col. No 136. p. 203.

*** This case was appealed:

THE HOUSE OF LORDS 'DECLARED, That the bond of provision in question having been granted in execution of a faculty reserved in the contract of marriage, the exception of death-bed did not lie either against the principal sum of L. 2000, or the annualrents or interest thereof; and it is therefore ORDERED, That so much of the said interlocutors as are complained of (sustaining the defence of death-bed to the extent of the annualrents) be reversed, and that the defence of death-bed be repelled; and it is further ORDERED, That the cause be remitted to the Court of Session in Scotland to proceed therein accordingly.'

* See APPENDIX.

1758. *August.*JANET BUCHANAN *against* ALEXANDER BUCHANAN of Auchmar.

By contract of marriage, dated in 1696, between William Buchanan, with consent of his father John Buchanan of Auchmar, and Jean Buchanan; John the father disposed to William his son, and the heirs-male to be procreated of that marriage, whom failing to the heirs-male of William by any other marriage, the lands of Auchmar.

Of this marriage there were born three sons and three daughters, viz. John, Alexander, Bernard, Janet, Katharine, and Helen.

The said William Buchanan did, in 1735, in implement of the marriage-contract, dispose to his eldest son John, and the heirs-male of his body; whom failing, to his second son Alexander, &c. his estate of Auchmar, yielding about 2000 merks of yearly rent; but under sundry conditions and reservations; particularly that John, by his acceptation thereof, should be bound to pay the granter's debts, conform to a list to be signed by him; 'And by and attour the said list of debts, reserving full power and liberty to me to burden and affect the lands, &c. above disposed, to the extent of L. 100 Sterling, and to grant security therefor, heritable or moveable, in favour of such person or persons as I shall think fit.' An annuity of 600 merks was likewise thereby reserved to the father; and John was also taken bound to pay the younger children 5000 merks.

William Buchanan afterwards divided the 5000 merks among his younger children, which was accordingly paid to them. John the eldest son entered to possession of the estate, under the title of that disposition, and held the same till his death, which happened in the 1744; when Alexander the second son succeeded, and entered to possess upon the same title. William the father was yet alive: In December 1746 he assigned to his daughter Janet his moveables, and arrears of his annuity; and in January 1747 he granted a deed in her favour, proceeding on a recital of the reserved faculty of burdening the estate with L. 100, contained in the foresaid disposition, and, in exercise thereof, obliging himself and his son Alexander to pay that sum to her, over and above her former provisions; *proviso*, That Janet should pay the one half of the L. 100 to her sisters Katharine and Helen.

William Buchanan died within thirty days of the time of granting this last deed, and had before contracted the illness of which he died.

Janet brought a process against her brother Alexander for payment of her provisions, particularly of the said L. 100 Sterling.

Objected by the defender; *imo*, The reserved faculty gave no power to the father to burden the estate gratuitously. The disposition bore to be in implement of his marriage-contract, by which the estate was already provided to the heir of the marriage; and a disposition with a reserved power to burden gra-

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A reserved faculty of burdening an estate, contained in a disposition by a father to a son, found capable of being exercised gratuitously and on death-bed.

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tuitously could not have been implement of that provision. Neither was the faculty intended for enabling his father to bestow such a sum on any of his younger children, as they were provided for in separate clauses of the deed. The true intention of the reservation was only to enable the father to contract a further sum of L. 100 of debt, if necessary, over and above those debts which he had already contracted, and which the son was bound to pay for him.

2do, Supposing the faculty might have been gratuitously exercised, yet it could not be done by the father upon death-bed. For although a man disposing his estate to a stranger, and reserving to himself such a faculty, may exercise it at any time; yet where the donee is son and heir, as in this case, to whom he is under an antecedent obligation to give his estate, the son notwithstanding the disposition, will still be understood to be heir, and as such have the privilege of reducing any deed made to his prejudice upon death-bed; more especially as here the clause does not bear expressly, that the faculty might be exercised *etiam in articulo mortis*.

Answered for the pursuer; imo, The disposition was more than sufficient implement of the contract, though with a reserved power of burdening gratuitously to the extent of L. 100; for notwithstanding the contract, the father might have contracted debts to any extent, or spent every shilling of the estate; whereas, by this deed, he put it out of his power to do so, and also gave the son possession in his own time, reserving only a small annuity. These considerations made it reasonable for him to be allowed the power of giving this L. 100 to whom he pleased. Neither is it competent for the defender to object to it, when both he and his brother accepted of the disposition, under that condition, and possessed upon it. Nor can the meaning of the clause be doubted to imply a power of burdening gratuitously, seeing it stands quite distinct in the deed, both from the clause subjecting the son in the father's debts, and from the clause of provision to children; and bears to be by and attour the aforesaid list of debts; and also in favour of such person or persons as he should think fit.

2do, The objection on the head of death-bed admits, that if the disposition had been to a stranger, or even to an heir, but such to whom the disposer was under no antecedent obligation to give his estate, and the heir had accepted the disposition, the faculty might have been exercised at any time; because a donee has not the privilege of an heir; and an heir, accepting of a disposition, is in no other case than a common donee. Now, the prior obligation, in this case, on the father, can make no distinction, because he was only thereby bound not to disappoint gratuitously the succession of his son, but might have spent the whole estate. If, therefore, he passes from that power, and even denudes of the possession long before his death, but under certain qualities and conditions; and the son accepts of his disposition, and possesses upon it; surely the latter must be thereby held to give up his right *qua* heir, and to betake himself to his disposition, with all its burdens and qualities. It matters not

that the clause does not bear the words *etiam in articulo mortis*, seeing the clause runs in general terms, without limiting the time for exercising the faculty, and a disponee cannot challenge on the head of death-bed.

‘THE LORDS found, That in virtue of the faculty reserved to William Buchanan, in the disposition granted by him to his son, he could gratuitously, and on death-bed, burden the said lands with the sum of L. 100 Sterling; and that he properly exercised the same in favour of the pursuer by the bond and assignation granted to her.’

Act. Burnet.

Alt. Montgomery.

Reporter, Woodball.

D. R.

Fol. Dic. v. 3. p. 172. Fac. Col. No 134. p. 247.

1765. February 28.

PRINGLE of Crichton *against* MARK his Brother.

MARK PRINGLE of Crichton settled his estate upon John Pringle his eldest son, and the heirs-male of his body; whom failing, to his younger sons *seriatim*, &c.; reserving the granter's liferent, with full power to him at any time in his lifetime, to burden the lands with such debts, gifts, and provisions as he shall think fit; to sell or dispoise the lands in whole or in part; and to revoke, alter, and innovate these presents at pleasure. This settlement was accepted of by John Pringle the son, who was legally infest.

Mark Pringle in *liege poustie* made competent provisions for his younger children, excepting his youngest son, to whom he gave an heritable bond upon the estate for L. 1000 Sterling. This bond being executed upon death-bed, John Pringle the heir brought a reduction of it upon that head. The defence was, That the pursuer had accepted of the settlement, which inferred his consent to every clause, and which of course barred his reduction.

This was a nice case. And the first doubt that occurred was, whether a reserved power to burden at any time in the granter's lifetime includes the time when one is on death-bed. The words strictly taken include this time; but it is far from being clear that the parties intended to include it. It was observed, that the natural import of such a disposition to an eldest son is only to save a service, and cannot be so constructed as to create a power in the granter either to alien or burden his estate upon death-bed; a power that no wise man would chuse to have, considering the arts it lays him open to in his last moments. And if his death-bed deed be left unsupported by the heir's consent, his privilege to reduce is undisputable; for his acceptance of the deed as disponee, does not cancel his character of heir.

In the next place, supposing the heir had consented in express terms, the question is, Whether such consent can bar the reduction? The doubt is, that if such consent be binding, the law of death-bed is at an end. For an eldest.

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An heir had consented, by acceptance, to a deed, of which he afterwards brought a reduction on the head of death-bed. The Court reduced; but this judgement was reversed on appeal.

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son to whom a disposition is offered in the foregoing terms, dares not refuse to accept, which would draw upon him his father's indignation. The bond was reduced as granted on death-bed. The Judges did not separate the two points; but it was the general opinion, that the son's consent, supposing it to have related to death-bed, could not bar him from challenging the death-bed deed.

Fol. Dic. v. 3. p. 173. Sel. Dec. No 232. p. 306.

. The same case is reported in the Faculty Collection :

IN 1748, Mark Pringle of Crichton, disposed those lands to John Pringle his son, and his heirs, reserving his own liferent, with full power to alter, sell, or burden.

The deed contained a clause, declaring that, by acceptance thereof, the disponee should be bound to pay all bonds of provision granted, or to be granted, and all debts and legacies which should be due by the disponent at his death.

Upon this disposition, a charter under the Great Seal was expedite, and infeftment taken.

In 1754, Mark Pringle, in consideration of L. 2000 being paid to him, which his son had got in portion with his wife, renounced the reserved faculties, with respect to a part of the lands, of about L. 300 per annum.

In 1758, having married a second wife, he so far altered the deed 1748, as to settle the estate upon John and his heirs male; whom failing, upon his sons by the second marriage; and, in this last deed, he reserved the same powers as in the former.

Mark Pringle granted sundry deeds in exercise of these reserved powers, particularly, an heritable bond for L. 1000 Sterling, in favour of his youngest son, which was executed by notaries, within nine days of his death.

John Pringle insisted in a reduction of this deed, and *pleaded*, 1^{mo}, That he never had accepted of the disposition 1748. He possesses part of the lands, in virtue of the onerous transaction in 1754. The rest of the estate he is entitled to take up by service as heir to his father. He cannot take it up in virtue of the disposition 1748, that deed being revoked; and he will not take it up in virtue of the disposition 1758; so that he is not affected by the reserved powers which it contains.

2^{do}, Even the express consent of the heir will not support alienations on death-bed; 13th November 1728, Reids *contra* Campbell, No 104. p. 3327.; 4th December 1733, Inglis *contra* Hamilton, No 105. p. 3327.; and 15th December 1744, Irvine *contra* Irvines, No 49. p. 2304. Much less can they be supported upon an implied consent, inferred from the heir's acceptance of a disposition.

3^{tio}, A reserved faculty to alter or burden *quandocunque*, must be exercised *habili modo*, that is, by a deed *inter vivos*, and in *liege poustie*, but cannot be

exercised on death-bed; 25th February 1663, *Hepburn contra Hepburn*, No 1. p. 3177.; also Dic. v. TESTAMENT; Craig, II. 1. 25. and Stair, III. 4. 14. and III. 8. 29.

Answered for the defenders to the 1st; There are various circumstances tending to show that the pursuer accepted the disposition 1748; but it will not vary the case, though he should be at liberty to repudiate it. If he is so, it can only be in consequence of the disposition 1758, which contains the same powers and faculties: Indeed, it is a mistake to say that the disposition 1748 was *revoked* by the disposition 1758; on the contrary, the latter proceeds on the recital of the former, and the alteration made by it, in the order of succession, is an exercise of the powers thereby reserved.

To the *second*; The cases of *Reids contra Campbell* in 1728, and *Irvine contra Irvines* in 1744, do not at all apply. No more was there found, than that the heir was not barred from reducing death-bed deeds, by having accepted of a disposition in full of all he could demand at his father's death. In these cases, there was not so much as a renunciation of the benefit of the law of death-bed; but, though an antecedent renunciation of this kind is not sufficient to bar a challenge, as was found, in the other case quoted under this head, that of *Inglis contra Hamilton* in 1733, it cannot be thence inferred, that the pursuer is not bound by his acceptance of the deed 1748, which, being executed 12 years before the disposer's death, can never be looked upon as an artifice used to defeat the law of death-bed; the light in which obligations, extorted from the heir, have been justly considered.

To the *third*; Though no person can affect his *heir*, properly so called, by a deed upon death-bed, or even by a testamentary deed, as appears from the authorities which have been referred to; yet, he can burden his *disponee* by any deed, which is a proper declaration of his will, and is authorised by the terms of the disposition. The disposer has this power in the case of a disposition to a *stranger*; and the heir who accepts of a disposition is in the same case with a stranger, and is equally affected by every condition, which is an inherent quality of his right.

This doctrine is laid down by Lord Bankton, III. 4. 48. and it is supported by a variety of decisions stated in the Dictionary, *b. t.* See 22d June 1670, *Douglas contra Douglas*, No 6. p. 329.; and 8th February 1706, *Bertram contra Weir*, No 68. p. 3258. where the exercise of the faculty on death-bed was sustained on this ground, 'That the heir had accepted and bruiked by the disposition so qualified.'

The pursuer has referred to a decision, 25th February 1663, *Hepburn contra Hepburn*, where the contrary doctrine appears to have been adopted; but, to this is opposed the late decision in the case of Lord Forbes, No 71. p. 3277., where it was established by a judgment of the House of Lords, that reserved faculties may be properly exercised upon death-bed.

No 71.

Nevertheless ' THE LORDS found, That the disposition in the year 1748, was not revoked by the disposition in the year 1758 ; but sustained the reasons of reduction of the bond for L. 1000 Sterling, as being granted on death-bed.'

Reporter, Colston.

Act. Lockhart, Miller, Advocatus.

Alt. Montgomery, Sir D. Dalrymple.

Fac. Col. No 6. p. 207.

* * * This case was appealed :

January 29. 1767.—ORDERED and ADJUDGED, That so much of the interlocutor of the 25th February 1765, as sustains the reasons of reduction of the heritable bond for L. 1000 Sterling, granted by Mark Pringle deceased, to Mark Pringle his youngest son, as being granted on death-bed ; as also, of the first codicil in question, subjoined to the last will of the said deceased Mark Pringle, as being a deed of a testamentary nature, be, and the same is hereby reversed.

S E C T X.

What circumstances infer Death-bed.

No 72.

1608. December 3. MR NICOL GILBERT, Supplicant.

MR NICOL GILBERT being in great debt, and thereby forced to sell some of his lands ; fearing that men should skar to deal with him, because the impotency of his gout held him bed-fast ; by his supplication desired the LORDS to direct him some of their number to visit him and try his estate ; which being done, and they reporting, that albeit he was impotent, yet it was of a lingering infirmity, and that his memory and judgment was sufficient ; they ordained that the alienations to be made by him should not be subject to reduction as upon death-bed.

Fol. Dis. v. 1. p. 217. Haddington, MS. v. 1. No 1494.

No 73.

Found, that a husband, 12 or 13 days before his decease, being sick of a fever and flux, and not

1622. February 1. ROBERTSON against FLEMING.

UMQUHILE — Robertson gave infeftment of liferent to — Fleming his spouse, of a tenement of land, by the space of 12 or 13 days before his decease, which right was craved to be reduced by Robertson's heirs, upon this reason, viz. as done in *lecto ægritudinis*, the husband being sick of a fever and

flux four or five days before the infeftment, which continued to the time thereof, and continually to the time foresaid of his decease, he dying within so short a time, viz. 12 days;—Thereafter it was *alleged* by the defender, That the infeftment was but a liferent, given by the husband to the wife, who of the law could not be prohibit to help his relict upon death-bed. Attour it was offered to be proven, That at the time of the giving of the infeftment, and divers days thereafter, the husband was in that state that he might have come out to the kirk or market, and that he lay not bed-fast, but sat at table, and eat and drank as at other times when he had health; and his sickness being a flux, that reason could not take away the excipient's right.—THE LORDS repelled the allegation, and found the reason relevant.

Act. *Mowat.*Alt. *Russel.*Clerk, *Sess.**Fol. Dic. v. 1. p. 217. Durie, p. 13.*

No 73.
coming to
kirk or mar-
ket there.
after, could
not infest his
wife in a life-
rent.

1624. *January 7.*SHAW *against* GRAY.

A MOVEABLE bond, granted seven weeks before the party's decease, but she being sick at the time, though not of a *morbus somnicus*, and not coming thereafter to kirk or market, was reduced *ex capite lecti*.

Fol. Dic. v. 1. p. 217. Durie.

No 74.

*** See This case Sect. 7. *b. t.* No 32. p. 3208.1635. *July 30.*RICHARDSON and LORD CRANSTON *against* SINCLAIR.

A SALE of lands made by a person paralytic, an year before his death, and while he was sound in his judgment and understanding, was yet found reducible *ex capite lecti*, unless he had come abroad after it.

Fol. Dic. v. 1. p. 217. Durie.

No 75.

*** See This case Sect. 7. *b. t.* No 34. p. 3210.1668. *February 25.*PATRICK DUN *against* ISOBEL and ELIRABETH DUNS, his Sisters.

UMQUHILE DR DUN having provided 4000 merks to one of his daughters, and 10,000 merks to another, and entertainment during their minority, that their portion might go to the fore, bearing annualrent; did thereafter grant to Isobel another bond of 2000 merks; whereof Patrick his heir raises reduction, as be-

No 76.
In a reduc-
tion on death-
bed, the de-
fender offered
to prove, that

No 76.

though the defunct had broke his leg, and so could not go to kirk or market, he was notwithstanding in perfect health when he executed the deed challenged. This defence was repelled.

ing done on death-bed, after the defunct had broke his leg, and the same was cut off, whereof he took a fever and died, and never went out to kirk or market :—The defenders *answered*, That they offered them to prove, that albeit the defunct happened not to come out, yet he was in his *liege poustie*, and perfect health, and did all his affairs, which did much more evidence his health, than the stepping out to the market; *2dly*, The bond in question being a provision to a daughter, it was a natural obligation, which the father might do on death-bed.—The pursuer *answered*, That the law allowed no other evidence to give capacity to dispoise in *liege poustie*, but going to kirk and market; and if any equivalent were accepted, it would render the most ancient law dubious and elusory; as to the *second*, the defender having been portioned before, any addition on death-bed had not so much as the favour of a portion natural.

THE LORDS repelled the defences, and sustained the summons.

Fol. Dic. v. 1. p. 217. Stair, v. 1. p. 534.

1671. June 28. The CREDITORS OF BALMERINO *against* The LADY COUPER.

No 77.

In a reduction upon death-bed, it is not necessary to condescend upon a particular disease.

THE deceast Lord Couper having made an heritable and irredeemable right of his whole estate and dignity to his Lady and her heir; the Lord Balmerino, his nearest heir in the estate, making use of the names of certain of his creditors, that he might not be necessitate to enter heir before the event of this plea, pursues a reduction of the said disposition, as being on death-bed.—The defender *alleged*, *1st*, That the reason of reduction, as it is libelled, is not relevant; that the defunct contracted a deadly disease before the making of the disposition, and that he died of the said disease, which is not relevant, unless the particular disease were condescended upon, otherwise it will remain conjectural and unsure; and witnesses cannot distinctly depone whether he was sick or not, specially he being an old man, so that they could not distinguish betwixt sickness and weakness through old age; *2dly*, The reason is not relevant, unless the disease were alleged to be *morbus santicus*, that might affect the mind, and infer a weakness, which is different from fatuity or insensibility; *3dly*, The defender alleged absolutor, because he offered him to prove that the defunct was in health the time of the disposition, at least in as good health as he had been for several years or months before, when he did go ordinarily abroad to kirk and market, about all his affairs; at least, if he had any indisposition, it was not *impedimentum rebus agendis*, because it is offered to be proven that he constantly put on his clothes, and walked up and down his house, convoyed strangers to their chambers freely, without being helped or supported; and in the same manner went down with others to their horse to the green, made several accounts and bargains, and frequently played at cards, all which must necessarily infer his health, unless a circumstantial disease were condescended upon and proven; *2dly*, The defender offered to prove that after the disposition, the defunct went

to kirk and market, at least to one or other of them, which the law hath allowed as unquestionable evidences of recovery of health, and which therefore is relevant, though sickness were specially proven to have been contracted before, and condescends that, the disposition being dated the 8th of December 1668, upon the Thursday immediately after, the defunct went to the market of Cupar, it being the market day, and upon the Sabbath thereafter heard sermon in the kirk of Cupar.—The pursuer *answered*, That this reason of reduction is most relevant, and in the same terms that the reason of death-bed has always been libelled; neither was it ever found necessary to condescend upon *morbus senticus*, but as Craig expresses it, *sufficit si morbus precedat et mors sequatur*, before the defunct goes abroad, yet *probatis extremis presumuntur media*, it is still presumed, that so long as the defunct, after the disease, remained within doors, that the disease continued, and that *præsumptione juris et de jure*; neither doth it admit a contrary probation, by alleging that the party convalesced *medio tempore*, otherwise than by his going out to public meetings at kirk and market; nor is there any necessity to condescend on the kinds of diseases, which even physicians themselves, and the most skilful can hardly determine. And as to the *first* defence, offering to prove that the defunct was in health, it is contrary to the libel, and nowise competent; for in the case of contrary allegations, the pursuer offering to prove sickness, and the defender offering to prove health at the same time, the pursuer, as being in the libel, must be preferred, especially considering that where such deeds are procured through importunity from sick and weak persons, who would do any thing to get leave to die in peace, the contrivers, by the same facility, may debar the access of any, but such as they have confidence in, and who have concurred with them in the contrivance, so that the disponent's sickness is *difficillimæ probationis*; yet *qualibet probatio sufficit*, as in this case, within a day or two of the disposition, my Lord was put to violent nature to attempt to go to the market, and three days after to the kirk, in both which attempts he failed; which doth sufficiently presume that he was sick before, and was not able to cover his sickness for a little time to attain the evidences that law requires to infer health; but if a contrary probation should be sustained, or preferred as more pregnant, and which would be by familiar persons in the house, and concurrers in the contrivance, this ancient and excellent law would easily be elided; and as to the evidences of health, they are noway relevant, neither are any private acts; but the law hath justly determined that the disponent must appear publicly in the solemnest meetings, that thereby it may be known that he is able to abide the air; and that matters of this importance be not probable by two picked or prepared witnesses, but that the same be cleared by the whole witnesses of a kirk or market, which cannot all be bribed, and no few witnesses dare adventure to depone against that common knowledge; so that no private or domestic acts, in or about the house, can be equivalent to coming to kirk or market. And as to the *second* defence, that the defunct came out to kirk and market, it ought to be repelled, because the pursuer offers to prove that he was supported

No 77.

—The pursuer *answered*, That the reply was not relevant, unless it were condescended *quomodo* supported, and that it was by upholding the defunct under the oster or by the elbow; but it is not relevant to allege that the defunct took any of the company by the hand, or that they took him by the hand, especially if it was in rugged or uneven places, in respect of the defunct's age; and that it is offered to be proven that he was ordinarily accustomed to take those who walked with him by the hand in such places; and for this there was alleged a practise lately done by the Lords betwixt Pargilleis and Pargilleis, No 85. p. 3304. whereby a disposition by Pargilleis was sustained, because he came to the market of Calder, albeit he was helped to and from his house, and up and down the stairs, and that he was not able to tell money, and was never at the kirk thereafter; and likewise a practise in anno 1647 was alleged, whereby Graham, merchant in Edinburgh, having made a disposition to his wife's daughter, the same was sustained, because he lived a long time and did his affairs in the house, and wrote the disposition, being two or three sheet of paper, all with his own hand, which is found sufficient though he did not go out to kirk or market*.—The pursuer *answered*, That the reply was most relevant, even though the supporting were only by the hand; for albeit where there were reiterate acts of going abroad without design, such circumstances would not be noticed, yet where the going abroad was so near to the disposition, and evidently done to validate the same, it hath been *ultimus conatus nature*, and hath not been of custom, but of necessity; so that when such an attempt is made of design, if the disponent have not so much strength as to walk without the help of any hand, it infers clearly the weakness and continuance of the disease. The defender repeated his allegiance, and offered to prove that not only the defunct went out to kirk and market, but that he went freely by his own strength, no body touching him.

THE LORDS being desirous that neither party should have the sole probation, by picking out such witnesses as made most for them, but that all the witnesses might be adduced, did, before answer, appoint either party to adduce witnesses to instruct the defunct's condition the time of the disposition, and thereafter, and anent the manner of his going abroad; and there being a great multitude of witnesses adduced by either party, the LORDS considered the relevancy and probation both together, by which the LORDS found that the reason of reduction was relevantly libelled, and that it was sufficiently proven that the defunct had contracted the disease whereof he died, before the disposition; and as to the defence and reply, the witnesses proved all clearly, that he was supported to the kirk and from it, and that he fell aswoond in his return; but the LORDS found it not necessary that the defunct should both go to kirk and market unsupported, but that either was sufficient; but that where both were attempted shortly after, and upon design, the manifest failing in the attempt in going to the kirk, did much weaken the prior attempt in going to the market; as to which the LORDS did consider, that the going free to the market behoved to in-

* See APPENDIX.

clude the free going to the market-place, and returning back from the same, not being supported in any place of the way; so that albeit many witnesses deponed the defunct walked freely, none being by him in some parts of the way coming and going, there was no number of witnesses that proved his walking freely all the way coming and going, even while he was within the town, but that many witnesses proved that he was supported, some in the whole way, and some as to several places, some by the oxters, some by the elbow, and most by the hand.

Therefore the LORDS found the reply relevant of supporting even by the hand, in any place of the way within the town, whether even or rugged, and found the same sufficiently proven; and therefore reduced the disposition, albeit the defunct's custom to take those who walked with him by the hand was also proven, whereunto they had no regard, this going to market being so soon after the disposition, and so evidently of design to validate it, and the defunct never having gone out after, except to the kirk when he was supported and fell aswooned; and as to the practise, that in anno 1647 was not produced, but it was in consideration of a sum left to the church by that disposition, and was generally cried out against by all persons, yet *una hirundo, &c.*; and as for Pargilleis' case, the LORDS perused the whole debate and testimonies, and found that Pargilleis lived near a mile from Calder, and that being an old goutish man, he was accustomed to be helped to and from his house, and that he rode to the town, but that he lighted then and walked freely through the market, and up a brae to my Lord Torphichen's house, and returned again to his horse without any help either by the hand or otherwise, and regarded not that he was helped up and down stairs, or to and from his horse, which the law doth not require, but only the going freely from the entry of the town to the market-place, and back again unsupported.

THE LORDS did also find none of the private acts alleged upon, relevant to prove health, or equivalent to going to kirk or market, and that there was no necessity to condescend on particular diseases.

Fol. Dic. v. 1. p. 219. Stair, v. 1. p. 742.

* * * Gosford reports the same case :

IN a reduction of a disposition of the Lordship of Cupar, made by my Lord *ex capite lecti*, the LORDS, before answer to the dispute, having ordained both parties to adduce witnesses; the pursuer for proving that the defunct had contracted a deadly disease the time of the disposition, and that he never convalesced, in so far as the next day thereafter, he having offered to go to the market, was supported both in the going and the coming, and did fall aswoon before he came back to his own house, and was carried in a chair; and the defender for proving he was in good health the time of the disposition, and that not only he went to the market and returned unsupported, but did other deeds

No 77. of health equivalent to the going to kirk and market, such as going about his private affairs, making accounts and subscribing discharges, playing at cards, dining and supping with gentlemen, and conveying them to their chambers : —THE LORDS having considered the whole debate in law, and the depositions of the whole witnesses adduced for both parties, did find, that it being proven by the testimony of many witnesses, that the defunct was sick and in a decaying condition ; that the allegiance that he was an old man past 72 or 73, did not elide the summons upon that ground, that old age is enough to put the person in a decaying condition, unless other acts of a perfect convalescence, equivalent to going abroad to kirk and market, had been proven ; *2do*, They found that all these deeds of convalescence, which were only proven to have been done privately in his own house, to which his domestics were only witnesses, for the most part were not equivalent to going publicly abroad ; *3tio*, That the going to market being of purpose to make valid the disposition, that it being proven that he took help of those who were nearest him, by laying his hand upon theirs, was sufficient to prove that he was supported, albeit it had not been more strongly proven by several witnesses, that they did take and hold him up by the arms, as many did depone ; but the LORDS declared, that where going to church and market is done of purpose to make valid any right, if it be proven that they were any ways supported, and had not strength enough of themselves to walk, it did not elide the reason of reduction *ex capite lecti* ; and that notwithstanding it was alleged that some of the way was rugged, and that the defunct was in the custom to lay his hands upon those that were next to him, upon any rugged or dirty way, when he was in perfect health ; which the LORDS did not regard, seeing *hoc agebatur*, and was principally intended that he might give evidence that he was in perfect health and strength, especially in this case, where, within three days, he having gone to the church by the unanimous testimony of all the witnesses, it was proven that he was supported to the church and from it, and did fall down by the way in a swoon, till he was recovered by strong waters, and that he never came abroad thereafter until he died, which was within three weeks. Likewise in this process the LORDS did not find the pursuer obliged to condescend and prove any particular disease which he had contracted, before the disposition ; albeit it was much urged that old age and the season of the year were sufficient to put him in a sickly condition, and to keep the house, so that some other disease which might be deadly, ought to have been proven to have affected the defunct ; for the LORDS found, that the knowledge of diseases being only proper to physicians, and a thing of itself most uncertain, it was sufficient to allege in general, that he had contracted sickness whereof he died, and never convalesced by going to kirk and market.

Gosford, MS. No 363. 364. 365.

1677. December 11.

LOCKHART *against* LOCKHART.

UMQUHILE John Lockhart did dispoise his whole means and estate in trust to the Lord Lee, for the use and behoof of several persons related to him on the mother's side, leaving nothing to William Lockhart, his brother by the second marriage. There was a declarator pursued against the said William, for declaring, that the dispositions made by John his brother, were valid deeds done in *liege pousie*, and that after the first disposition he went from Edinburgh to Calder, and was there at sermon in the kirk; and after the second disposition renewed at Calder, because the first was vitiate by alterations, he did ride to the Lee. William not compearing, witnesses were adduced and proved the libel, and thereupon decret followed. William raiseth reduction of this decret, and of the two dispositions, upon this reason, that the decret was in absence, and the allegiance of supportation was neither proponed for him, nor were the witnesses examined or deposed thereanent; but he offers to prove, that John had contracted the disease (whereof he died) before both dispositions, and that after he subscribed the first, he was carried in a sedan to Calder, and when he went on foot to and from the kirk, he was supported; after the second disposition, that when he rode from Calder to the Lee, his man rode behind him to hold him upon the horse; that he was visibly in a dying condition, and was helped to and from his horse, and that he never came out of the house of the Lee till he died, but was carried once in a chair to the garden, and not able to walk up and down his chamber without help, and that in a part of the way to the Lee he was tied with a cloath that he might not fall from the horse.

All which the Lords found proven, and therefore reduced both the dispositions and decret, albeit a prior testament was produced, wherein most of the same provisions were left in a legacy, signed two years before his death. Whereupon it was *alleged*, That the presumption of doing these things by weakness or importunity, were taken off; which was not respected, seeing his testament was ambulatory, and ineffectual as to heritable rights, so that he might have changed his mind between the testament and the dispositions; neither was it respected that most of his estate came by his mother's father.

Stair, v. 2. p. 576.

1694. February 20.

LADY SCOTSTON *against* DAVID DRUMMOND.

THE LORDS advised the probation led in the case pursued by Lady Scotston and Colquhoun of Tilliquhen, her trustee, *contra* David Drummond of Invermaith, for reducing the dispositions made of the lands of Rossyth, &c. by William Stewart, the last Laird thereof. THE LORDS did not regard the first defence proponed for Invermaith on his bond of tailzie, seeing it did not appear that it ever was delivered, or that the posterior dispositions were relative to, or in im-

No 78.

Death-bed was inferred by the defunct being held on horse-back by a person sitting behind him, when he went a journey.

No 79.

A running sore was found to be a disease whereof one may die as well as of sickness; and there-

No 79.
fore sufficient
to subject a
person in that
situation to
the law of
death-bed.

plement thereof; and therefore refused *hoc loco* to examine the witnesses in the instrument taken on his going to kirk and market, to validate that tailzie in October 1687. The next question was, Whether a sore running in a person might not be such a disease whereof one may die as well as of sickness, and if after that he can validly dispoise his heritage? The LORDS generally thought that the one might distemper one's health as much as the other, and so might incapacitate him from disposing, seeing in *edicto* *Ædilitio vitium dat locum redhibitioni* as well as *morbus*, and both Hippocrates and Galen were cited as of this opinion. The third point was, If by the probation it appeared that this infirmity in his leg, which he got by a fall, with the swelling and ulcer therein, was the sickness whereof he died. And the plurality of the LORDS found it was, though this extended death-bed to a great latitude; for the first disposition was in February 1688, and he did not die till December 1690; so that here the mortal disease is made to be upon him near three years. And in Cleland, No 86. p. 3305. it was much complained upon, that the LORDS had found him on death-bed for several years before his death, and reduced rights he had granted *medio tempore*. The fourth question arose on the probation of Rossyth's going to kirk and market, and of his being supported or unsupported therein; and though there were some objections against two of Scotston's witnesses, that they were not worth the unlaw, yet generally the LORDS thought the two attempts Rossyth made of satisfying the law in going to kirk and market, the one at the Tron-church, and the other at the High-church of Edinburgh were not sufficient, nor did give any convincing evidence of his convalescence; and that the probation of his being supported was more pregnant than the other; though it was confessed, that being cripple, he needed more support than another man, and that it could not be expected that he could perform that solemnity with the strength and vigour that another could; for he was brought near the kirk in a sedan; and, in Colquhoun, No 89. p. 3310. the going in a coach to the Abbey-church was found a supportation; and, in Lockhart, *supra*, No 78. it was found, though John Lockhart his brother did ride several miles after the disposition, that it was supportation; though it was argued for Invermaith, that Rossyth through infirmity of his legs, used to be carried in a chair; for the LORDS, thought this was but *ultimus naturæ conatus*, and in such cases, state and ceremony is required to be laid aside; as was found between Blair Drummond and Graham of Garvock about Drummond of Balloch's estate*. And the President instanced in a Lady that used to be led by the hand at other times, if she goes to kirk and market on such an occasion, she must dispense with that civility and go alone. They next considered the acts of sanity condescended upon as equivalent to kirk and market, wherein it first occurred, whether they are to be taken jointly, or considered separately, *ut quæ non prosunt singula multa juvant*. But the LORDS deferred the advising of these till 22d current.

* See Stair's Institutes, B. 3. t. 4. § 28.

February 22.—THE LORDS advised the rest of the points of Tilliquhen's reduction against Invermaith, mentioned 20th current; and considered the probation anent the equivalent acts of sanity: And though the President affirmed, that he never saw them sustained, yet the LORDS thought there might be such acts stronger, and more pregnant, than the evidences of health required by our law of going to kirk and market. What if a man should ride several stages post after he had signed a disposition, which is drawn in question as signed on death-bed, and should come to the Session-house and plead causes, would not that validate the right, though he should never go to kirk or market, especially if they be deeds that are not strained nor affected, nor done of purpose and design, but ordinary acts in management of affairs, or for diversion or recreation? Therefore, the LORDS found the equipollent acts proven to have been done by Rossyth after February 1688, as his going to Inverkeithing at the election of a commissioner for that town, to the meeting of estates in 1689, his staying a whole day at sea in a boat at fishing, his walking in Lady Home's yard, his visiting prisoners in the tolbooth, were such as proved his convalescence, and that he was then in *liege poustie*, and were sufficient to validate the dispositions in January 1688, because many of these reiterated deeds were in 1688 and 1689. But the LORDS did not yet determine the validity of the disposition given by Rossyth to Invermaith in August in 1690, about four months before his death, because there were few deeds of health proven after that time, and the two attempts of his going to kirk and market after that were already found strains of nature, and therefore they superseded to advise this last part, till it might be tried if the parties in the mean time could settle and agree.

Fol. Dic. v. 1. p. 217. Fountainball, v. 1. p. 611. & 614.

1696. June 11.

GORDON against GORDON.

THE LORDS advised the reduction *ex capite lecti*, pursued by James Gordon of Techmuiry against Gordon of Daach, of some bonds granted by the parson of Rothiemay, his father, to his daughters of the first marriage, and whereunto Daach had acquired right. The answer was, any thing the granter then laboured under, was not a *morbis* but a *vitium*, he, by a rheumatism, having contracted a lump in his back which dislocated two of the *vertebræ* or whorl-bone; and though he kept his bed, and was unable to walk even with crutches, yet the last of the bonds is more than three years before his death, and he cannot be reputed to have then contracted the sickness whereof he died; but truly he took a fever, which, in two or three weeks, dispatched him. *Answered*, The disjointing of his back was the cause of the sickness which carried him off, *et causa causæ est causa causati*; and, after he took bed, he had several fainting fits, and used much physick and cordials; and though he took a fever, yet

No 80.

A person by rheumatism contracted a lump on his back, which dislocated two of the *vertebræ*, so that he kept his bed, and was unable to walk even with crutches. In that condition he granted bonds, the last of which was more than three years before his death.

No 80.

The Lords found these bonds were not reducible *ex capite lecti*.

he was sick before, and *omnis morbus desinit in febre* as the physicians tell us; and it does not import that he did all acts of judgment and understanding; for the law considers their liableness to impressions and importunity at that time; as was found, Creditors of Balmerino against Lady Couper, No 77. p. 3292.; Shaw *contra* Gray, No 32. p. 3208.: And the great distance of time betwixt the date of the right, and the granter's decease, was not regarded by the Lords, Clieland of Faskin, No 86. p. 3305.; though that interlocutor was much complained of.

THE LORDS having advised the probation, thought it hard to fix a death-bed so far back, and that it ought not to exceed a year; and that the immediate, not the remote causes of one's death were here to be considered; therefore they found death-bed not proven in this case and assoilzied from the reduction.

Fol. Dic. v. 1. p. 217. Fountainhall, v. 1. p. 72c.

No 81.

What understood to be *morbis continuus*.

1741. November 28.

SOMERVILL against GEDDIE.

IN a reduction upon the head of death-bed, the proof came out thus: *1mo*, The granter, for a dozen of years before her death, was troubled, at intervals, with gravelish pains; and she died of a fit of the gravel upon two days illness. *2do*, She was not troubled with the gravelish pains when she signed the disposition challenged, which was at nine at night, though she was in bed at the time; and some of the witnesses add, that she did not appear to be in perfect health. *3tio*, She lived 45 days thereafter; and, until within two days of her death, was in the ordinary state of health she had been in for a dozen of years before, managing her affairs within doors, unless when she was troubled with the gravelish pains. *4to*, She was of entire judgment when she signed the deed.

THE LORDS, by a narrow plurality, found it proved, That Marion Miller was on death-bed when she granted the disposition in question.

Rem. Dec. v. 2. No 22. p. 37.

1756. January 28.

EDWARD PRIMROSE against JOHN PRIMROSE.

No 82.

What is a sufficient proof of death-bed in a person who had been long confined to bed?

IN the 1737, John Primrose disposed his lands of Burnbrae to the pursuer, his heir at law; but, in the 1752, when betwixt 70 and 80 years of age, and confined to his bed, he destroyed that disposition, and disposed the lands to the defender, the son of his natural brother.

John Primrose neither went to kirk nor market after executing the last disposition, and died within 41 days of its date.

The pursuer obtained himself served heir in general to John Primrose, and brought a reduction of the disposition 1752, upon the head of death-bed.

The defender *contended*; That the deceased was not on death-bed when he executed the deed, but was only confined to his bed by old age, and a weakness in his feet; that he died of an apoplexy, with which he was seized eight days before his death.

‘THE LORDS allowed a proof to both parties of the condition of the health and capacity of the deceased at the time of his granting the disposition quarrelled, and for some time before and afterwards to the time of his death.’

At advising of the proof, the pursuer *pleaded* from the evidence, That the deceased had been seized with the gout in his hands and feet about 14 years before his death; and that the fits of that distemper generally recurred upon him twice a-year: That he had been seized with an iliac passion about a year and a half before his death: That this distemper was removed by proper medicines; but that his constitution had been thereby impaired: That watery swellings appeared in different parts of his body; and that he had remained bed-ridden for several months before his death: That the surgeon who had formerly attended him, and who had occasion to see him about a week before his death, depones, That, in his opinion, the iliac passion threw him into a lingering distemper, whereof he at last died: That other persons who saw the deceased both before and after the date of the deed quarrelled, depone, That he appeared to be *in trouble*, and to be an infirm and *dying man*: That a few days before his death, he was seized with a trembling fit, and from that time became sensibly weaker and weaker till he died; but, that this fit must not be considered as a new distemper, but as the crisis of the distempers under which he had long laboured.

The defender *answered*; That, at the time of executing the deed, John Primrose did not appear to have contracted the disease whereof he died, nor indeed to have been affected with any disease at all. He was confined to his bed by old age and a weakness in his feet, occasioned by former fits of the gout. He was seized with a trembling fit a very few days before his death, and more than a month after he had executed the disposition quarrelled; from that fit is the disease whereof he died to be dated; the iliac passion being an acute distemper, could not be the cause of his death after an interval of a year and a half. Neither could the gout be the cause of his death; for that it was fixed in the extremities of his body; and a gout of that nature is not to be held a disease rendering one incapable of disposing of heritage. Besides, the deceased was not actually affected with the gout when he executed the disposition quarrelled, but had only contracted a lameness from former attacks of that distemper. The sudden illness whereof he died, can no more be connected with the gout and iliac passion, than an ague in one year, and a flux in the next, can be connected with a fever whereof one dies in the third year.

‘THE LORDS found the reason of reduction relevant and proven, and reduced the deed.’

Act. *A. Pringle & Bruce.*

Alt. *Miller & Lockhart.*

Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. p. 173. Fac. Col. No 183. p. 273.

No 83.

Not necessary to constitute death-bed, that the illness should, before the date of the settlement, be so violent as to confine the party to his bed, or even to his house.

1787. December 11.

ALEXANDER BLACK against DAVID BLACK.

AN action was brought by Alexander Black, for setting aside a deed of settlement in favour of David Black, as having been executed while the granter was on death-bed.

It was proved, that for several years the testator had laboured under a severe cough, attended with a difficulty of breathing; that before executing the settlement, he had become considerably weaker; and that he died thirty-five days after; but that he had never been confined to his bed, or even to his house, nor prevented by his illness from going about his ordinary business, his faculties till the last remaining in full vigour.

Pleaded in defence: The law of death-bed, which originally resulted from feudal principles, and was afterwards continued from a distrust of the Popish clergy, who often exercised their influence on dying persons, to the disinheriting of the legal heirs, ought now to be confined within very narrow bounds. But even while its operation was most extensive, the settlement in question could not be thought to fall under it. It is true, that the deceased did not outlive the sixty days, and that he was not either at kirk or market. These circumstances, however, are not indispensably necessary to validate a settlement, but only to prove, in those cases where the testator had been formerly ill, that he had been restored to such a situation as sufficiently qualified him for making a distribution of his effects. But here there is no occasion for any proof of re-convalescence; because it does not appear, that before making the settlement, the testator laboured under such a distemper as could subject his actings to any legal objection. He was neither *sick* nor on *death-bed*, but continued, for a month after, to conduct his affairs in his ordinary way, and with his usual propriety. If it were sufficient to constitute death-bed, that the most trifling indication of decay had appeared, there would be no end to disputes of this sort.

Answered; Though the causes from which the law of death-bed was at first introduced may not now exist, the regulation itself is not the less binding; nor has it yet ceased to be of the utmost use in preserving the rights of the lawful heirs, and the quiet of dying persons. To admit the argument offered on the part of the defender, were to set it aside altogether. It is not necessary for supporting a challenge on the head of death-bed, that the distemper under which the testator at the time laboured should be a *morbus senticus*, or the certain cause of immediate death. All that is required is, that at the time of making the settlement, he shall have been subject to that particular illness which terminated in his death: A circumstance fully established in the present case, where the disorder being of the consumptive sort, its ordinary symptoms had appeared, and grew more and more distressing as his dissolution approached.

‘THE LORDS repelled the defences.’

Lord Ordinary, *Ankerville*.
Alt. *Maconochie, Abercromby*.

Act. Dean of Faculty, *Hagart*.
Clerk, *Colquhoun*.

C.

Fol. Dic. v. 3. p. 173. Fac. Col. No 12. p. 22.

S E C T. XI.

Reconvalescence by going to Kirk and Market.

1629. July 7. MAXWELL against FAIRLEY.

A DISPOSITION made *in lecto ægritudinis* is declared by the Lords to be when a person contracted a sickness whereof he died, and was not able to go out of his house without help; and all dispositions made in prejudice of his heirs during the time of his being in this estate are null, and although the sick person be brought out of his house to the kirk and market-place by the help and support of men and horse (as sometimes falls out) after the said disposition was made, and thereafter return to his house, and does not after then, once or twice, resort to kirk and market without help, as said is, the disposition will be thought done *in lecto ægritudinis*.

No 84.
A disposition was found to be *in lecto*, because though the party went to kirk and market, yet he was supported.

Fol. Dic. v. 1. p. 217. Auchinleck, MS. p. 54.

* * * Durie reports the same case.

IN a reduction of a bond of alienation of lands at the instance of the heir of the annailzier, because it was done *in lecto ægritudinis*; and the defender alleging, that the day of the date of the said bond, the maker thereof came to the church, and heard the prayers, and thereafter came to the cross and market-place, and thereafter went and drank in two taverns, which were of his familiar acquaintance before, and then returned home again, and played at the cards with his friends, who came to visit him divers times thereafter, and lived after the bond a month or thereby; so that albeit he kept the house all this time thereafter, yet that could not be counted as a deed done *in lecto ægritudinis*, he being then sound in mind and knowledge, and of health of body; and he offered to prove that he came out as said is, being then healthful and not supported by any who led him, but done freely of himself, without help or aid of any other. This allegiance was repelled, and the pursuer preferred to the probation, alleging *impedimentum*, that that day when the defunct came out, he was upholden, and led by the arms until that he did the acts foresaid, being then sick and infirm, of the sickness whereof he never recovered, but died within the space of twenty days or thereby thereafter; and albeit there was a preceding contract between the defunct and the defender, whereby either of them made others their heirs, yet seeing the bond had no relation, nor yet bore to be done for implement of the said contract, the said bond was not sus-

No 84. tained as depending on that preceeding obligation, without prejudice to pursue upon the contract *prout de jure*.

Act. *Advocatus & Cunninghame.*

Alt. *Nicolson, Aiton, & Lawrie,*

Clerk, *Gibson.*

Duric, p. 457.

No 85.

1669. February 26. PARGILLEIS against PARGILLEIS.

A defunct had gone several times to the market, and walked there unsupported, and other times abroad, after the disposition challenged, sometimes a-foot, and other times on horseback. This was found relevant to elide the reason of reduction on death-bed, although he was helped up and down stairs, and to, and from his horse, which was led by the bridle, notwithstanding that he continued sickly to his death.

UMQUHILE Abraham Pargilleis having no children but one bastard daughter, disposes some lands acquired by him to Abraham Pargilleis, eldest lawful son of that daughter. John Pargilleis his brother's son, and nearest heir, pursues a reduction of that disposition, as being done in *lecto*; and the defender alleged that the defunct went abroad to kirk and market thereafter unsupported; and the pursuer replying that he was supported; and either party contending for preference, the one that he walked free of himself, and the other that he was supported;

THE LORDS considering the advantage to the party that had the sole probation, would prefer neither; but, before answer, ordained witnesses to be adduced for either party, concerning the condition the defunct was in, as to sickness or health when he subscribed the disposition, and the manner of his going abroad, whether free, or supported; and now THE LORDS having advised the testimonies, by which it was proven that the defunct was sick the time of the subscribing of the disposition, and that he continued sick till his death; it was also proven that he went unsupported a quarter of a mile, when the sasine was taken, six days after the disposition, and that after the same he went three times to Calder, and about three quarters of a mile off, and that he was helped to his horse, and from his horse, and that he was helped up stairs, and down stairs; but that he walked a-foot unsupported in the market of Calder, and up and down from my Lord's house, being three pair of butts of rising ground. It occurred to THE LORDS to consider whether the sickness proven would have been sufficient, not being *morbis santicus*, or in *extremis*, or whether the presumption of health sufficient to *liege poustie* was enough that he came out to kirk and market, albeit the sickness remained, and whether the probation of the sickness remaining could take away that presumption; and whether his being helped to his horse, and from his horse, or up and down stairs, and his man holding his bridle as he rode to, and returned from, Calder, did infer that supportation, which elides the presumption of health by going abroad, or whether the going freely on foot (having only a staff in his hand the rest of the way) was sufficient to prove that he went abroad in *liege poustie*.

THE LORDS found that the defunct's going abroad after the disposition, as is before exprest, was relevant to elide the reasons of reduction on death-bed, notwithstanding of his being helped up and down stairs, and to and from his horse, and by leading his bridle, and that notwithstanding that he continued sickly to his death.

Fol. Dic. v. I. p. 217. Stair, v. I. p. 615.

1671. *June 28.* CREDITORS OF BALMERINO *against* LADY COUPAR.

It is not necessary to prove that the defunct went both to kirk and market unsupported ; either is sufficient.

Going free to the market must include going free to the market-place, and returning back from the same, not being supported any part of the way.

Fal. Dic. v. 1. p. 218.

* * See this case Section 10. *b. t.* No 77. p. 3292.

1672. *December 5.* CLIELAND *against* CLIELAND of Faskein.

CLIELAND of Glenhove having no children, disposed his estate to Clieland of Faskein, of whose family he was descended ; his sister's son as nearest heir to him, did raise a reduction of the disposition, as being done upon death-bed ; and the defender having alleged, that the defunct having had a pain in his legs and feet, did thereby keep the house for many years before he died ; but that he contracted no inward disease when this disposition was made, being two years or more before his death, but at that time he was in perfect soundness of judgment, and of the same condition of health, as he had been for seven years before ; *2do*, Though it could be proven that he contracted any sickness, he perfectly convalesced and came abroad unsupported, when he gave sasine upon his disposition, *propriis manibus*, and did oft-times walk about his house, and did play several games at penny-stone, which was an exercise requiring far more strength than going unsupported to kirk and market, and returning, being so short a space, for no man was obliged to walk further than men did ordinarily come upon horseback to the kirk ; nor can it be controverted, that albeit going to kirk and market be the ordinary evidence of convalescence, yet there may be other evidences sufficient ; and that going to kirk and market cannot be the sole evidence of convalescence, as in the case if a person were lame, or had received a hurt in his foot or leg, by a fall, or otherways, that it did not arise from any inward disease. *3tio*, The defender offered to prove, that the defunct went to the kirk unsupported. The pursuer *answered* ; That his reason of death-bed stood most relevant, and was libelled in the ordinary form ; viz. that the disposition in question was made after the defunct contracted the sickness, and went never abroad thereafter, until his death ; so that the contracting of his sickness being proven, and his dying before he went abroad, *probatis extremis præsuntur media* ; and as for the allegiance of his health, it is contrary to the libel, and sickness is more positive and pregnant ; neither can the acts equivalent be sustained, unless they were such as were clearly more pregnant to prove convalescence, than going abroad to the kirk in the time of the gathering of the

No 87.

Two witnesses deponing that the person alleged sick was supported when he went to kirk or market, was found to make a full probation, although many witnesses deponed *negative* that they did not see him supported ; and it was found that domestic deeds were not to be regarded for proving convalescence.

No 87. congregation, or to the market in market time ; but all the acts condescended upon, are but performed before a few persons picked out for that purpose ; and are far less than the acts performed by the Lord Cowper, which yet were not found relevant : And as to the alleged going to the kirk, all that can be pretended is, that the defunct was borne in a chair within a pair of butts or two to the kirk, and did thence attempt to go to the kirk freely of himself, of design to validate this disposition ; for though he lived two years thereafter, he never came out again ; and such attempts of design are most suspicious ; and if they be not perfectly performed, as the law requires, they are of no force ; as in this case, where the going to the kirk was not to any public meeting of the congregation, nor was there either market or market-place : And albeit the defunct might have ridden to the ordinary place where men alight, he being carried to that place in a chair, is no ways equivalent ; for sick folks, as they are not able to go without help, so they are not able to sit upon horseback without support ; nor doth it import whether the defunct kept the house long before, or after this disposition ; for in a most favourable case, wherein Sir Robert Richardson makes a disposition for the use of his children ; after which, though he remained eighteen months in his house, yet did all his affairs, and had only a palsy in one of his sides, which was not *impedimentum rebus agendis* ; nevertheless the Lords reduced the disposition. No 34. p. 3210.

THE LORDS, that they might not give either party the sole probation, did, before answer, ordain witnesses to be adduced for either party, anent the condition of the party deceased, when he made the disposition, whether he was sick or in health ; and anent the manner of his going abroad thereafter ; and especially anent his going to the kirk ; and whether he was supported, or whether he walked freely of himself without help ; and there being many witnesses adduced upon either hand, the import whereof was, that the defunct was not only sore by an extrinsic pain or trouble in his legs or feet, but that the sameness proceeded from inward sickness, whereby he had kept the house for several years before and after the disposition, but that all along he was very infirm, and spoke of himself as a gone and a dying man, and ordinarily sat in a chair, and lifted himself by a pole that was fixed by him, but that he was still sound of judgment and memory, and did his affairs. It was also proven, by the notary and witnesses of the disposition, that he went out unsupported, and gave sasine *propriis manibus* upon the disposition, upon the croft near the house ; and that some time he went to the barn, and to some roan trees about a pair from the house ; and one of the witnesses deponed, he played three or four plays at pen-nistone with him, but he could not be positive whether before or after the disposition. It was also proven, that he was carried in a chair from his house to a house within two pair of the kirk ; and that he walked from the chair to the kirk, and staid some time there in a house, and returned from the kirk to the chair again, and was carried home therein ; and as to his walking free unsupported, from his chair to the kirk, and back again, several of the witnesses de-

poned, that they did not know, in regard there was a number of persons about him as he walked ; and several deponed, that he walked freely without help ; and two deponed, that themselves helped him, as he went to the kirk, from a strand which was in the way. Upon which probation the Lords found that the contracting of the sickness, whereof he died, was sufficiently proven, notwithstanding of the allegiances and testimonies as to his health : And they found also, that his going abroad about his house was not equivalent to kirk and market ; but because of the one witness, who proved the playing of several games at pennistone, deponed that the pursuer was one that played with him, the Lords did presently examine Mr Robert Boyd, who followed the pursuit, and whom the Lords conceived to be understood to be the pursuer, in regard the pursuers named in the process were women, who being examined, he deponed he never played with the defunct at pennistone, but that he heard that the defunct had played at it with others the time he kepted his house, but that was long before the disposition.—THE LORDS also found, that the manner of the defunct's going to the kirk was not sufficient to infer convalescence, and therefore reduced the disposition.

1672. *December 6.*—There was a bill given in by Faskin, containing many allegiances, founded upon the depositions of the witnesses, and the LORDS proceeded in the advising, and craving; that seeing the act was only before answer, and that there was yet no litiscontestation in the cause, that the LORDS would hear them further ; and that they offered to prove, by witnesses above exception, that the defunct, after the disposition, went with them a mile from his house freely unsupported, which, with the other acts of going abroad, already proven, was sufficient to instruct convalescence.—THE LORDS repelled the bill without any deliverance, as being upon the matter of testimonies, and advising of the cause, which was improper to parties to allege upon. And it being questioned amongst themselves, whether or not, after probation is closed and advised, and such acts before answer, parties might propone new defences, and crave terms to prove the same?—THE LORDS found, that when acts before answer were upon the whole moment of the cause, both anent the libel, the exception of going to kirk and market, and the reply of supporting, and that the Lords had ordained the probation to be before answer, that there could be no new allegiance or probation more than if it had been in an ordinary litiscontestation ; because, the intent of making it before answer was, that there might be in effect a conjunct probation, which form admits not after litiscontestation, and yet was of great importance, as carrying men's inheritance ; wherein, if ordinary litiscontestation had been made, the pursuer might have by any two habile witnesses proven, contracting of the sickness, and supporting ; and the defender, by any two witnesses, might have proven going to kirk and market ; whereas, by this probation, there was none that knew any thing of the affair, but were examined, and thereby the lieges are in much more security ; and if, after that new litiscontes-

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tation were made, or new probation admitted, it would never be wanting in any case, and would exceedingly vex parties by the length and expense of process; but that the Lords *ex propria motu*, if any thing occur to them in a dubious probation, for clearing thereof, as they do in all concluded causes, so in this manner of probation they might *ex officio* ordain the same to be adduced. *See PROCESS,*

Fol. Dic. v. 1. p. 218. Stair, v. 2. p. 126. & 128.

* * * Gosford reports the same case :

In a reduction pursued at the said Margaret's instance, as heir of line to James Cleland of Glenhove, her brother, of a disposition of his lands made to the Laird of Faskine, as being done in *lecti ægritudinis*, he having contracted a deadly disease, whereof he never recovered until he died; it was answered, That any disease he had was only an infirmity in his legs, wherewith he was afflicted by the space of ten years before the disposition, which infirmity was not *morbus santicus*, and such as the law requires, being *impedimentum rebus agendis*; in so far as he continued to do his business, in making of accounts and bargains, and did eat, drink, and sleep, and take tobacco, in that same manner that he had done for ten years before. And, when he made the disposition, he went to the fields and gave sasine *propriis manibus*; and thereafter went to the kirk of Cumbernauld, and made merchandise with a chapman for some ribbons, and survived the said act for the space of two years, and died of a general infirmity and weakness of his whole body, which did not appear but a few days before he died. It was replied, That the reason stood relevant notwithstanding, because the defunct's sickness did appear not only in the infirmity in his legs, but that in many years before that deed, and until his death, he was not able to go abroad, and do such acts of health as the law requires; but, on the contrary, when he went to kirk and market, he was supported in a chair made of purpose, until he came near to the church, and, when he came out of it, he was not able to walk, but was supported; and any merchandise he made was only simulate in buying a few ribbons from a chapman brought there of purpose; and for all other acts, they being only domestic and *inter privatos parietes*, were not such as the law regards to evince a full recovery from sickness. And for that instance of giving sasine *propriis manibus*, it could not be regarded, seeing he only went through the close a little way to the next field, and returned again.—THE LORDS, before answer, having allowed to both parties to adduce witnesses for proving the condition of the defunct before the disposition, and when he went to kirk and market; as likeways having considered the practices adduced for both parties, such as Richardson, No 34. p. 3210. Pargilleis, No 85. p. 3304. Lord Balmerino, No 77. p. 3292. they did sustain the reason of reduction, and found, that as to all domestic deeds, they were not relevant to infer a full recovery of health; and it being proven, that when he went to kirk

and market, he was supported in a chair till he came within a quarter of a mile of the church, and that, by the deposition of two witnesses, he was even there supported a part of the way, albeit there were but two witnesses who deponed the same, whereas there were many witnesses deponed the contrary; notwithstanding that no mortal disease was condescended on and proven; they did reduce the disposition as said is; seeing two witnesses were positive that he was supported even when he came out of the chair to walk to the church, which being positive acts demonstrating infirmity, were more to be regarded than the depositions of many witnesses deponing that he was unsupported, which was a negative, especially this going to church and market being designed to make the disposition valid, and thereby to satisfy the law; and that he having survived the same for the space of two years, did never hazard to go again to kirk or market to do any acts equivalent.

No 87.

Gayford, MS. No 539. p. 286.

1673. January 9.

NICOL against JOHNSTON.

No 88.

UMQUHILE Henry Peers having granted a bond, dated the 5th day of September 1645, of 2000 marks of borrowed money, the right thereof coming now to John Johnston in anno 1656, there was a decret recovered thereupon against Thomas Nicol and Lawrie, two heirs-portioners to the defunct, and thereupon an apprising which is now expired. Nicol raises reduction of the bond, and all that followed in consequence, as being granted by the defunct *in lecto aggritudinis*, after he and his wife and family, upon suspicion of the great plague in anno 1645, were put out to lodges in the moor, and died there within some few days after the date of the bond; and albeit the condition of the defunct did not admit of the access of witnesses to prove that he was actually infected before, yet his being sequestrate, and dying shortly thereafter, and never cleansed, but remaining in his lodge, did infer a sufficient presumptive probation thereof. And the defender having *alleged*, That the time of the bond the defunct was in health uninfected, and that he had frequently walked abroad in the moor after the date of the bond, and drank with several persons, which behoved to be sufficient to instruct convalescence, seeing his being suspect of the plague hindered his access to kirk and market; especially considering, that the pursuer is scarce within the eighth degree to him, and hath of design forborne this reduction till the witnesses were dead, who might have proven the party's health, convalescence, or the onerous cause of the bond, seeing he is compearing in the decret 1656, without any mention of death-bed, or any reduction thereupon; —THE LORDS having, before answer, ordained witnesses to be examined concerning the condition of the defunct the time of the bond, who proved that the defunct died about the middle of September 1645, and that they saw him several times walk abroad in the moor after the date of the bond, before his death.

Found as
above.

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and drank with him at that time, *but in several cups*, he being under suspicion of the plague, and never cleansed, but that they knew not when he was actually infected;

THE LORDS found that the bond was granted *in lecto*, and reduced the samen, and all that had followed thereupon; but declared the effect of the reduction to be only from the sentence, that the defender might make use of the bond as a legacy against the moveables, and so reserved the samen, and the pursuer's allegiance of intromission, by this apprising, in satisfaction, as accords.

Fol. Dic. v. 1. p. 218. Stair, v. 2. p. 146.

1685. January.

LAIRD OF LUSS *against* CARDEN.

No 89.

In a case where a party had gone to church, his deed was notwithstanding reduced, as there was evidence that he had been supported, which preponderated over some presumptions to the contrary.

In the reduction of a bond of 20,000 merks, granted by Sir John Colquhoun of Luss to his Lady *ex capite lecti*, at the instance of the granter's brother and heir of tailzie, a probation being led as to Sir John's going to kirk and market, and supportation, one witness deponed, That Sir John, in the going down stairs, leaned his hand upon a man's shoulder. *2dly*, Several witnesses deponed, That, at the foot of the stairs, he took a glass of sack for a cordial. *3dly*, A single witness deponed, That the defunct staggered as he went through the close, and was supported by the deponent, and then was transported to the church in a coach, and when he came out of it near the church door, he handed his Lady down the steps to it, where he staid sermon, and did not re-enter his coach till most of the people were gone. And one witness says, that the defunct's Lady went close at his shoulder when he came out of the church, and, as he thought, gave him some support. These separate exceptions and qualifications of supportation, at several places, were proven by single witnesses; but all agreed that he went in coach, and that the coach waited for him till sermon was over. Again, it was proven, that four days after the going to church, he went in coach to a shop, and bought golf-balls, but was supported.

Alleged for the pursuer; That the party cannot be said to have gone to church unsupported, when he made use of a coach, whereby he was carried, and not suffered to walk. And though the going to church in coach, or taking a lady by the hand, when a person has no other design than to hear sermon, should not be thought to import weakness, yet where a person goes industriously to ratify deeds by the performance of acts of strength and health, the using of such helps is to be considered as an *indicium* of weakness, in respect the person who puts himself to such a test of health, is *in maximo naturæ conatu*; besides, supporting in the going to church was proven by single witnesses, admiculative of one another; and the going to market thereafter evinceth, that they thought the going to church was not duly performed; and the failing in the last effort doth invalidate the first.

Answered for the defender ; That every act of supportation should be proven by two witnesses ; and the taking of a glass of sack was proper enough to the party at his going abroad to hear a long sermon, though he had not been sick. *2do*, Sir John used to go to church in coach. And, further, his taking of a coach on this occasion was but reasonable, his Lady being with him, and the season of the year dirty. *3tio*, The taking his Lady by the hand at the church-door was but an act of civility ; and his sitting in the church during a long sermon, and the christening of a child, was *per se* a sufficient act to demonstrate such a measure of health and strength as the going to church required ; and the instrument bore, that he went vigorously, and all the way unsupported, which the witnesses insert adhered to ; and the witnesses as to the supporting being but *testes singulares*, the defender's probation is most pregnant.

THE LORDS found the deed was done on death-bed, and that the positive probation of *supported* was more pregnant than the negative of *unsupported*. And the LORDS thought, that the exercising acts of health and strength, for validating rights, by the help of coaches, sedans, or leading Ladies, are used but as blinds to cover weakness, and subject to a suspicion, which was rational for the party to prevent, had he been able.

Thereafter it was *alleged* for the defender ; That the deed could not be reduced as on death-bed, because it was granted in remuneration of a right passed from by the receiver, in favours of her husband the granter.

Answered ; That the bond quarrelled was of a date five days posterior to the Lady's renunciation, and she accepted a settlement of the date thereof, in full satisfaction of all that she could claim, &c.

Replied ; The Lady offered to prove, by the writer and witnesses of the deed of settlement, made to her when she quitted her former security, that it was communed she should have the 20,000 merks bond over and above ; and that it was drawn at the same time with the rest of the papers, but that Sir John being indisposed, could not sign them altogether.

THE LORDS adhered to their interlocutor, in respect of the clause, *In acceptation*, &c. in the settlement, prior to the bond ; but, before reporting, recommended to the Lord Chancellor to settle the parties.

Fol. Dic. v. 1. p. 218. Harcarse, No 654. p. 181.

1686. March. JOHN CUNINGHAME *against* JAMES HAY.

IN a reduction of a disposition by John Suttie to James Hay, *ex capite lecti*, at the instance of John Cuninghame, who had adjudged from Balgon, apparent heir to the disponent ;

The defender having *alleged* upon the disponent's going to kirk and market, and adduced witnesses for proving thereof,

No 90.

It is not being at church and market, so much as the going there, which infers perfect health.

No 90.

It was *answered* for the pursuer ; That the probation was defective, in so far as the witnesses do not say that they saw the defunct come out of his chamber and return home ; but only, that they saw and left him at such a place upon the street, which argues, that he was not in a condition to go down and up stairs unsupported, otherwise the witnesses had been also called to that part of the progress. And it is not the being at church and market, but the going there, that infers perfect health. *2do*, The progress was performed in an unlawful time, under cloud of night, between four and five o'clock, in the month of December. *3tio*, Acts of supportation are proven at the shop where he was, and he returned home in a chair or sedan, into which he was helped, and groaned heavily ; and he died within seven days after. *4to*, The witnesses vary in their depositions from what is asserted in the instrument, *5to*, The going to church in the night-time, when the party's condition could not be exposed to the view of indifferent and unsuspected persons, but only to picked witnesses, taken along to serve a turn, is not sufficient to elide the exception of death-bed. *6to*, The not returning home before the witnesses is a material defect. And the being carried in a sedan is a plain supportation and argument of death-bed.

Replied for the defender ; It was not necessary to have witnesses to the going out of the house and returning. *2do*, The progress needed not to be made in the time of the forenoon's service ; for the vespers was the most solemn meeting at church before the Reformation, and the evening prayers since ; and the defender passed from the instrument. *3tio*, Any acts of supportation are denied ; and a sedan is not a supporter.

THE LORDS, *nemine contradicente*, found the disposition was made *in lecto*, and reduced.

Harcarse, No 656. p. 183.

1711. December 5.

CRAUFURD against BRICHEN.

No 91.

A man having been many months ill of a *tympaniter*, and while under the disease having signed a disposition, after which he did not live 60 days, but died of the same disease, yet went unsupported to kirk and market after granting the writ ; the Lords finding

JAMES CRAUFURD skinner in Glasgow, having disposed some houses and other heritage to one Brichen, to breed up a boy in the skinner-craft, as a fund in all time coming ; Mr Mathew Craufurd, his nearest heir, raises a reduction of that disposition as done *in lecto* ; and a probation being allowed both parties, before answer, as to the state and condition of his health the time of subscribing, and his coming to kirk and market after the date of it, unsupported ; the probation came this day to be advised ; and it appeared that in February 1707, he was taken with a dropsy, but which did not hinder him to go about his business abroad till September thereafter : That on the 13th of August he signed the disposition quarrelled, and on the 15th he was all day in church, and thereafter he went to the flesh-market and bought some meat therein, as also cleared accounts with several people, and interchanged discharges with them ; and went to Doctor Maitland's house, and consulted him, who depones he found

him far gone in that species of hydropsy called a tympanites. Others said, his belly was as big as a woman's with child used to be ; and that they looked upon him as a dying man before the disposition. THE LORDS agreed in this, that from the probation it appeared he had contracted the sickness whereof he died before he signed the disposition, and that he did not live 60 days after it, as the 4th act 1696 requires. Yet it was argued, that his going to kirk and market after the deed, seemed to be proven ; which the law has pitched on as characteristic of sanity and reconvalence, and is *præsumptio juris et de jure*, not admitting a contrary probation, seeing he was not struck by a *morbus santicus*, which is *impedimentum rebus agendis*, such as acute fevers affecting the head, and disturbing our reason ; which dropsies, gout, &c. do not ; under such, men continue as sensible and rational as ever. The old custom was, they went to church though not in sermon-time, and then bought something in the market, and had a notary and witnesses pickt and chosen to the purpose ; which the Lords justly suspected as *affectata diligentia et ultimus naturæ conatus*, a straining of nature, but here the man went carelessly to kirk and market as he was wont, without any view, prospect, or design, and nothing of fainting or supportation proven, as was in these cases cited by Stair, tit. SUCCESSION, in Graham of Garvock's case *, where he vomited in the return, which the Lords found sufficient to annul the disposition ; and in Stewart's disposition to Drummond, in 1692, No 79. p. 3297. the Lords found his going out in a boat on the Forth to the fishing, and marroting, as pregnant and equipollent a deed, as his going to his parish church of Dunfermline. Some of the Lords thought his being hydropic in February, and dying of it in September, instructed sufficiently that he laboured under that distemper in August, when he signed the disposition, and so was incapable by law as *constructione juris* then *in lecto* : But the plurality thought the going to kirk and market so clearly proven, that they sustained the disposition, and assoilzied from the reduction *ex capite lecti*. It is not every going to kirk and market that will satisfy the law. I suppose a man in the paroxism of a hot raging fever, when their blood is exalted by the agitation of the animal spirits, and they have more than ordinary strength, should run to kirk and market, after a disposition signed by them. I believe no body will think this answers the design of the law, which is to give some mark of their recovery, though afterwards they may relapse and die of the same disease : And upon this ground to prevent clandestine attempts, the act of sederunt 29th February 1692, has most rationally provided, that the going to church when there is no congregation there, or going to the market, not in market time, when there is no confluence of people to observe him, shall not be sufficient to validate any prior right ; for the custom was to go to the old kirk (that always stands open) with his notary and picked out witnesses at his back, and make a turn or two when there was no other body there, and then go to the Creams, and buy some little penny worth and so return home. Which abuse THE

No 91.
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No 91. LORDS condemn, and declare they will not sustain, in time coming, any such practice.

Fol. Dic. v. 1. p. 219. Fountainball, v. 2. p. 683.

1725. January 28.

ALEXANDER RAGG Merchant in Aberdeen, *against* GEORGE FORBES and
ALEXANDER DOUGLAS Merchants there.

No 92.

The Lords found the alternative of having gone either to kirk or market relevant to support a disposition challenged on the head of death-bed.

WILLIAM RAGG (after he had contracted the sickness of which he died) made a disposition of his heritage and heritable effects to the defenders, his brother-in-law and nephew, which contained a full power to the disponent to revoke, alter, and innovate at his pleasure, or to burden the right with what sums of money he should think fit, without consent of the disponees. Thereafter, and within a few days of his death, he granted two several rights of the same tenor, one in favours of Alexander Forbes, and the other of Margaret Ragg, by which he bound and obliged him, his heirs and successors in his lands and heritages, to make payment to them of L. 2000 Scots equally between them; and there was a clause adjected, whereby it was provided and declared, that in case his heritage should not amount to the sum of L. 2000 Scots, that then Alexander Ragg and Marjory Forbes should be holden and obliged, each of them to accept of the just and equal half of the said heritage and heritable effects, in full payment and satisfaction of those bonds.

Alexander Ragg, as apparent heir to William, insisted in a reduction of this disposition upon the following grounds: *1mo*, That it was executed on death-bed; to which it was *answered*, that the granter had gone either to kirk or market unsupported, after signing the disposition; and in support of this defence, the decisions, Pargillies against Pargillies, No 85. p. 3304.; Lord Balmerino against Lady Cowper, No 77. p. 3292., and the act of sederunt 1692, were adduced. *Replied*, That the alternative was no qualification of convalescence in terms, but the defenders ought to qualify and instruct, that the disponent had gone both to kirk and market, because the law of deathbed being consuetudinary, the relevancy of this defence against it must be determined from the acceptance in which our lawyers have taken it, who have constantly conjoined both members in their treatises and pleadings; and likewise from the sense of the nation with respect to this question, which appears from the decisions, Shaw against Gray, No 32. p. 3208., and Maxwell against Fairly, No 84. p. 3303., in which the parties who endeavoured to validate a disposition, never rested their endeavours, by going to kirk or market, but attempted to go to both.

THE LORDS found it sufficient to support the right quarrelled, that the defunct, granter thereof, went to kirk or market, after granting the same; but found it relevant for eliding the same, that the defunct was supported, to be proven *prout de jure*.

No 92.

The pursuer next insisted upon this ground of reduction, 'That the disposition, containing a faculty to revoke, innovate, and alter at any time during the granter's life, *et etiam in articulo mortis*,' he had, in pursuance of that faculty, altered and annulled the same, by granting the two bonds above mentioned, since thereby the subjects in the disposition were fully exhausted, which was a virtual alteration thereof; and in effect the case came to be the same, as if William the disponent had by a second disposition annulled the first, and of new disposed in favours of the persons to whom the bonds were granted; in which case the first disposition would have fallen, and the second would have been reducible *ex capite lecti*, as was found 23d January 1708, Livingston against Baillie, No. 69. p. 3261.

It was answered for the defenders; That the granting of these bonds was no more than an exercise of the reserved faculty to burden; and since they were willing to pay the sums in the bonds, they might retain the heritage; and it was *jus tertii* to the pursuer to found on these after-rights.

THE LORDS repelled the reason of reduction founded upon granting bonds to Alexander Ragg and Marjory Forbes, in respect the disponees were satisfied to pay these bonds.

Reporter, Lord Pollock. Act. *Ja. Graham, sen.* Alt. *Jo. Horne & Alex. Gordon.* Clerk, Justice.

Fol. Dic. v. 3. p. 174. Edgar, p. 157.

1763. July 9.

LAIRD against KIRKWOOD.

JAMES LAIRD, as heir at law, having raised a reduction against Margaret Kirkwood, of a disposition in her favour by John Kirkwood, as having been granted by him after contracting the disease of which he died, about three weeks after the date thereof; it came out, upon proof, that the disease of which Kirkwood died was a disease proceeding partly from old age; that he laboured under this disease a considerable time before granting the disposition in question; that after granting it he went to a horse-race at Lochwinnoch, where there was a sort of market occasioned by the conflux of people, but no legally established market; and he complained to several people in the market that he was ill.

In support of the reduction it was urged, *imo*, That the being in kirk or market as an evidence of reconvalence must be restricted to a legal market, where it is presumed that all sorts of persons are convened; *2do*, That the going to kirk or market is only a presumption of reconvalence, and must yield to more pregnant evidence of the continuance of sickness. And here is direct evidence even by the disponent's own acknowledgment to several people in the market that he was no better. The judgment was as follows:

'Find it proved, That the deceased John Kirkwood went unsupported to the market of Lochwinnoch after the date of the disposition, and therefore repel the reason of reduction.'

No 93.

In a reduction of a disposition on the head of death-bed, it was proved that the disease of which the granter died was a decay, proceeding partly from old age; that he laboured under this disease a considerable time before granting the disposition in question; that after granting it he went to a horse-race, where there was a sort of market oc-

No 93.
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The going to kirk or market after executing the deed challenged, is commonly considered as evidence of reconvalence, and might justly be so considered during that period of our law, when the lapse of time did not bar the challenge, and when, after the deed was granted, there was latitude sufficient for the granter to be ill and well more than once. But the time of three-score days, which secures a deed from being challenged upon the head of death-bed, according to our present law, makes it scarce credible, without the most direct proof, that a man who is under a *morbis santicus* when he makes a deed, should afterward be restored to perfect health, and at last fall ill of a disease which occasions his death, all within the space of three-score days. In our present practice, however, the going to kirk or market continues as formerly to bar the reduction; not surely as a proof of reconvalence, but only as evidence of that degree of sense and understanding which is sufficient to support the deed.

In the present case, the granter went to the market of Lochwinnoch the same day he granted the deed; and if he was ill in the morning when he granted the deed, and for a long time before, which is proved, he could not be in perfect health at noon when he went to the market, even abstracting from his own acknowledgment of his being no better. If it was right, therefore, to sustain this circumstance as sufficient to bar the reduction, it could be upon no other foundation than that Kirkwood, by going to the market, showed himself to be in such a condition as to be capable to execute a deed. From this consideration I draw the following inference, That whatever disease a man may labour under, yet if it disqualify him not for public worship, nor for transacting his ordinary affairs in a public manner, such disease will not be considered as *morbis santicus*, nor bar him from executing a rational deed.

Hence a ready answer to the two topics urged in support of the reduction. With respect to the *first*, if the going to a market be considered as evidence of such vigour of mind and body as to qualify a man for granting a deed in prejudice of his heir, which undoubtedly it is held to be, it can make no difference whether the market be legally established or not; because the one is no better evidence of health than the other. And with respect to the *second*, did the going to kirk and market rest upon the footing of reconvalence, the argument would be invincible; but as it is laid hold of only to prove a degree of vigour sufficient to qualify a man for making a deed, the argument is of no force.

Fol. Dic. v. 3. p. 174. Sel. Dec. No 208. p. 274.

No 94.

1776. July 9.

FAICHNEY against FAICHNEY.

FAICHNEY pursued a reduction *capite lecti* of a disposition of heritage made by Mr Faichney, minister of Collace, within thirty days of his death. It was proved, that the disponent had been in a declining state of health, with some symptoms of palsy, before executing the deed, and that this disease terminated

in death; but he enjoyed all his faculties, transacted his ordinary business, and went both to kirk and market, as he expressed himself, 'in order to confirm his will.' THE COURT sustained the reasons of reduction. See APPENDIX.

Fol. Dic. v. 3. p. 174.

No 94.

1787. December 11.

ROBERT TAILZEOUR, against ELIZABETH-JEAN TAILZEOUR.

THE lands of Barrowfield, having been formerly destined to heirs-male, would have descended, after the death of the late proprietor, to Robert Tailzeour, his uncle, to the exclusion of Elizabeth-Jean Tailzeour, his sister. On 9th April 1782, however, Mrs Tailzeour was called to the succession by a deed of settlement; for setting aside which, a process of reduction, on the head of death-bed, was brought.

It appeared from the proof, that in February 1782, the deceased had been seized with a consumptive disorder; and that, in the following month, he went to Edinburgh to take the advice of physicians; who gave it as their opinion that he would not survive long; and on the 22d April he died, only 13 days after the date of the settlement.

On the other hand, it was proved, that as the settlement was most rational, by preventing the exclusion of a sister, with whom the deceased had always lived on the most friendly terms; so to the hour of his death the testator had been in the full possession of his faculties; that a very few days after the execution of the settlement, he had gone to the town of Montrose, to dine with his sister, and on that occasion alighted from his carriage without help; and that, after standing some time in the streets, and conversing with some of his acquaintance, he went into his sister's house, which is in the market-place; and this happened during market hours.—The pursuer

Pleaded; Were the law of death-bed founded on a presumption merely, that every mortal disease was accompanied with such a deprivation of reason, as disqualifies a person from the right administration of his affairs, it might be obviated by evidence, either arising from the settlement itself, or from extraneous circumstances. This, however, would be quite inconsistent with the object of the regulation, which was introduced for the humane purpose of preserving the peace of dying persons, and for preventing settlements which had been made or approved of by the party while in full health from being set aside, at a period when it was at least a possible case, that owing to the imperceptible decay of the mind, which so often corresponds with that of the body, the deceased had been influenced by such considerations as at any other time would have had no weight with him. Thus, though it should appear that a settlement made

No 95.

Being in a market-place, though only for the purpose of visiting a friend, found sufficient to infer reconvallescence.

No 95.

on death-bed was highly reasonable, and although no circumstances could be alleged from which either an improper influence on the part of the person called to the succession, or an ill-grounded resentment against the heir at law, could be discovered, still the deed, as executed by one under a legal disability, must be ineffectual.

As, therefore, it has been proved, that the deceased, before making out the deed in question, had contracted that illness which was the occasion of his death, the only thing to be considered is, whether any proper evidence of the convalescence has been established, so as to bring this case under one or other of the exceptions that have been made to the general law. That he did not, by surviving the 60 days, remove the legal challenge, agreeably to the statute of 1696, c. 4. must be admitted. It seems equally clear, that the other requisites of his going to kirk or market have not been complied with. It is true, that posterior to the date of the settlement, the deceased was in the market-place, and on a market-day; but this alone never can be thought to answer the purpose of the law, which was, not only that testators should be brought into a situation where their conduct might be observed by impartial witnesses, but that, in the course of the proceedings which usually take place there, an opportunity might be given of examining the real state of their minds. Such an opportunity could not be afforded by the testator's having merely appeared in a market-place in the way of travel, or, as in the present case, for the purpose of visiting a friend.

Answered; In order to a proof of legal convalescence, by the testator's being at a market, it is only necessary that he should be in the market-place, during market hours, unsupported. It is no more required that he should buy or sell while there, than that, in the case of his going to church, he should preach. Indeed, the circumstance of his not attending minutely to the observance of the ordinary formalities ought to go a considerable length in support of the deed. For, if the mere going to kirk or market, when performed for the sole purpose of giving effect to a settlement, is to be held sufficient, though it must afford the clearest indication of the testator's declining health, it would be unreasonable that the same event should not be attended with the like effect, when, so far from going to either of those places with a view of excluding the legal challenge, it appears that none of the parties imagined this to be necessary. This reasoning has been confirmed by several decisions. In that of the Earl of Roseberry *contra* his Sisters, 29th July 1736, No 102. p. 332. the deceased came to Edinburgh from his country seat, and afterwards went to the cross, between the hours of twelve and one in the afternoon; and although it was objected, that the cross was not a market-place, the objection was over-ruled.

THE LORDS, not unanimously, 'sustained the defences.'

Reporter, Lord Anker-ville.

Act. Wight, Maclaurin.

Alt. Lord Advocate, Abercromby.

Clerk, Menzies.

C.

Fol. Dic. v. 3. p. 175. Fac. Col. No 11. p. 19.

S E C T. XII.

Circumstances inferring Convalescence, whether equivalent to going to Kirk and Market.

1671. February 7. LOWRIE of Blackwood *against* Sir JOHN DRUMMOND.

No 96.

In a proof of death-bed, it was found, that the defunct's private way of going abroad, though unsupported, was not equivalent to his going to kirk and market.

SIR ROBERT DRUMMOND of Meidhope, having disposed his lands of Scots-toun to Sir John Drummond, for love and favour, and for better encouraging Sir John to pay his debt, as the disposition bears, and under reversion of a rose-noble in his own life; Mr John Drummond, Sir Robert's apparent heir, grants a bond to Lowrie of Blackwood, whereupon he adjudges the land from the apparent heir, and pursues a reduction of the disposition, as done on death-bed. In which pursuit, witnesses were appointed to be examined, *hinc inde*, concerning Sir Robert's condition when he made the disposition, and thereafter till his death. The sum of the probation was, that before the disposition, Sir Robert had contracted an apoplexy, whereby he remained senseless for a time, but by cure there remained a palsy in his tongue, and a vertigo in his head, which continued till his death, and about a year after that the sickness affected his brain, so that he lost the remembrance of things; and most of the witnesses deponed, that he was not sound thereafter in his judgment, but that he kepted on his cloaths, and was not affixed to his bed, and went frequently and walked in his garden and to the Court-hill, half a pair of butts off; and one of the witnesses deponed, that he came to his house alone, a quarter of a mile off; but that he went never to the kirk nor market, nor any public place. Whereupon it was *alleged* for the defender, That the defunct continued in health at and after the disposition, and that his going so frequently abroad, was equivalent to his going to kirk and market, which was sufficient to elide the reason of death-bed; and that the palsy being but in his tongue, albeit he mis-named things, it did not import his being on death-bed, especially seeing he disposed for payment of his debt, equivalent to the worth of the land, his disposition being to a friend of his name, who relieved him of his debt, his heir not being his son nor descendant, and incapable to relieve him of his debt. It was *answered*, That the contracting of his sickness being sufficiently proven to be before this disposition, and the continuance thereof to affect his brain, in that case nothing could purge the same, but his going to kirk and market, which were the acts required in law, and could not be supplied by his going privately abroad, and not to any popular public meeting; and as to his debts, they could not validate the disposition by exception, though the defender might, by way of action,

- No 96. affect therewith the estate, or burden the heir on whose bond it was adjudged, especially seeing the disposition bore for love and favour, and redeemable for a rose-noble.

THE LORDS found the reason of death-bed sufficiently proven, and that his private going abroad (though unsupported) was not equivalent to going abroad to kirk and market, or public meeting, where the disease continued to affect the brain; but they found the paying of debts equivalent to the worth of the land relevant by way of exception, in regard the disposition bore to be for payment of his debt.

Fol. Dic. v. 1. p. 218. Stair, v. 1. p. 716.

- No 97. 1671. June 28. CREDITORS of BALMERINO against LADY COUPER.

IN a question of death-bed it being proved, that the defunct himself constantly put on his own clothes, walked up and down his house, conveyed strangers to their chambers freely without help or support, and in the same manner went down with others to see them take horse, made several accompts and bargains, and frequently played at cards; all this was not found relevant to infer health, or equivalent to the going to kirk or market.

Fol. Dic. v. 1. p. 218.

* * * See This case, Section 10. b. t. No 77. p. 3292.

- No 98. 1683. February. The YOUNGER DAUGHTERS of MOUNTONHALL against The ELDEST.

Many strong circumstances inferring convalescence, not admitted as equivalent to going to kirk and market.

IN a reduction *ex capite lecti*, at the instance of James Hamilton of Moun-tonhall's two younger daughters, of a disposition of his land and 20,000 merks, in favours of his eldest daughter, whereby she was made to have a greater share than the rest;

The defender, for supporting of her right, *alleged* upon deeds done there-after by the disponent, equivalent to the going to kirk and market, which, upon probation, amounted to this, that he rode to Edinburgh, and called at Cald-coats by the way, where he spoke with one Hislope, and also that he passed by Peppermill; but that appeared not to have happened on the same day. Again, one witness deponed, that he spoke with him on the street of Edinburgh; another deponed, that he bought his barley in a change-house in Edinburgh; and one deponed, that he went to Fisher-row, and bought a midden of muck: And several witnesses deponed, that he walked unsupported about the doors, and managed his business discreetly, after the date of the deed quarrelled; but that he never went to church after his disease, which was a gout and a palsy, nor did ever recover of it.

Answered; Law having fixed upon the going to kirk and market, as signs of *liege poustie*, equipollent acts are not to be sustained, unless, at least, they have the essential qualities of these of kirk and market, viz. be public, and performed before indifferent witnesses; for, how easy might two witnesses be got to support him for the space of four miles, except at particular places. And it was not deponed, that he lighted from off his horse; and a man under a great sickness might ride so far.

THE LORDS found the defunct was *in lecto*; and therefore reduced the disposition.

Fol. Dic. v. 1. p. 218. Harcarse, (LECTUS ÆGRITUDINIS.) No 648. p. 179.

No 98.

1683. February. WILLIAM LIVINGSTOUN *against* JANET GOODALE.

IN the reduction of a disposition of some heritable sums made by a Quaker *ex capite lecti*, the LORDS sustained the following qualifications sufficient to elide the reason of death-bed, That the disponent had several weeks after the disposition sitten in his shop, and sold his goods; and, that he had walked before his shop-door, and bought a suit of cloaths in the next shop; and that he being a Quaker, was not obliged to go to church to ratify his deed.

Fol. Dic. v. 1. p. 218. Harcarse, (LECTUS ÆGRITUDINIS.) No 651. p. 180.

No 99.

1687. November 25. KEIRIE *against* CRAIGENGELT.

IN the case between John Keirie of Gogar and Craigengelt, in a reduction *ex capite lecti*, the LORDS refused to sustain these acts as equipollent to his going to kirk and market, that after the disposition he came down a very rugged way beside Stirling, without any help, and there took coach and went to Alloway, where he died.

Fol. Dic. v. 1. p. 219. Fountainball, v. 1. p. 483.

No 100.

* * * Harcarse reports the same case:

IN a reduction *ex capite lecti*, of a disposition made by one Craigengelt to John Keirie's son, at the instance of the disponent's heir;

It was *alleged* for the defender; That the defunct did posterior acts of health equivalent to the going to kirk and market, viz. he came a pair of butts out of his house unsupported to a coach, wherein he travelled six miles to Alloway, and walked up two pair of stairs to John Keirie's house, and did several other domestic acts.

No 100.

Answered ; The qualified defence is not relevant to import health, nor equivalent to the going to kirk or market : For, 1. The defunct's going in coach, contrary to his former custom, is an argument of great weakness ; and the reason of the law's pitching on kirk and market is, because there indifferent and unsuspected witnesses will be found ; and a person will not willingly expose himself in public. But if men were allowed to perform the *indicia sanitatis* before picked out witnesses and confidants, heirs could have no security against death-bed deeds.

THE LORDS repelled the defence as qualified.

Harcarse, (LECTUS ÆGRI TUDINIS.) No 660. p. 189.

1694. February 20.

LADY SCOTSTOUN and COLQUHOUN of Tillihaven *against* DRUMMOND of Innermaith.

No 101.

THE following acts to prove re-convalescence sustained equivalent to going to kirk and market, viz. going from Edinburgh to Inverkeithing, to assist at the election of a Commissioner to Parliament, spending the whole day in a boat at sea in the way of diversion, walking in the Lady Home's yards, and visiting prisoners in the tolbooth.

Fol. Dic. v. 1. p. 219. Fountainball.

*** See This case, Section 10. b. t. No 79. p. 3297.

1736. November 24.

JAMES Earl of ROSEBERRIE and HIS CREDITORS, *against* LADY MARGARET and DOROTHEA PRIMROSE.

No 102.

In a reduction, it was proved, that the defunct, after granting the deed challenged, had come into Edinburgh from his country seat some few miles distant, gone to the Cross betwixt twelve and one, walked there half an hour unsup-

ARCHIBALD Earl of Roseberrie, after contracting the disease of which he died, disposed part of his heritage to his younger children ; of which the present Earl brought a reduction on the head of death-bed ; and, a proof having been allowed to both parties, the substance thereof amounted to this, That the grantor, some months before the date of the deed, was seized with a *diabetes* ; but thereafter growing better, so as to be able to go about his ordinary affairs, he one day rode into Edinburgh, lighted at the Grass-market, and from thence came up to the High-street, and walked at the Cross for a considerable while, betwixt twelve and one o'clock ; but, having rode out that evening to Dalry, he met with such stormy weather by the way, as occasioned his disease to return upon him, of which he died in a fortnight thereafter.

At advising the proof, it was *argued* for the Earl, &c. 1mo, The going to kirk and market unsupported, is not a *præsumptio juris et de jure* of convalescence; for, if there are evident tokens of the continuance of the indisposition, it will be sufficient to exclude the presumption of recovery, arising from the party's going to kirk and market. So says Lord Stair, p. 601. (623.) 'That the presumption of convalescence, by public appearance at kirk and market, may be elided by contrary evidence; particularly, if there were evident tokens of the continuance of the sickness,' &c. Now, if this is the law, surely a proof, as there is in the present case, (by the granter's physician and surgeon) that he had the disease upon him the day upon which he came to town, is sufficient to take off the presumption. 2do, Though going to kirk and market has been found a presumptive evidence of re-convalescence, yet equivalents have not hitherto been admitted; for a party's going publicly abroad has not the same effect in law, as going to the kirk or market: *e. g.* To go to a field conventicle, to a wedding, or to a court of justice, would not be equivalent to going to kirk and market; because the law allows no other presumptive evidence, but the going to kirk in time of divine service, or to market in market-time. Now, to apply this to the point in hand, it is not pretended that the defunct went to the kirk; and, with respect to the market, the Cross is no market-place for any thing whatsoever: The town has several other places for selling commodities, and to which these must be brought before they are sold; nay, persons acting otherwise are punishable. But, supposing it were a market-place, the defunct's coming there is not enough, unless it appear he came in market-time; for, if it was not the market-day, the coming to the market-place goes for nothing. Now, here the proof is silent what day of the week the defunct walked at the Cross.

Answered for the disponees; If by re-convalescence the pursuers mean an absolute recovery, so as to be out of danger of dying of the disease, no such thing is required; the legal re-convalescence is only to be so far free from the influence of the distemper, that a man may follow his ordinary affairs; such as going a journey, or to kirk or market, where multitudes meet, and business is done. If the granter can do this, without failing in the attempt, or being defeated by it, he is deemed out of the case of death-bed; which is Lord Stair's opinion, who treats this very question, in the decision, 26th February 1669, Pargellies, No 85. p. 3304.; where the Lords assolized from the reduction, notwithstanding there was a proof of the continuance of the sickness, in regard the defunct went to the market unsupported; which holds with greater force here, as the granter came to the Cross without any particular view to validate the deed. Nor is it to the purpose, the disease was then upon him; seeing its effects were then suspended, so as they did not hinder him from going about his business; were it otherwise, this absurdity would follow, That persons subject to the gout and gravel, and who often go abroad with such ailments upon them, would be considered as on death-bed.

No 102.
ported, and
conversed
with people
of business.
The Lords re-
pelled the
reason of re-
duction.

No 102.

To the *second* it was *answered* ; In fact, the market-cross stands in the market-place, although the magistrates have appointed, for the conveniency of the lieges, other places for selling commodities ; at the same time, the area round it is the only place where herbs and fish are sold, and where the merchants keep their exchange. *Lastly*, As to the observation, That it does not appear the Earl was there upon a market-day, it is sufficient to observe, That from some circumstances of the proof, it is probable it was not on a Sunday ; and the rest of the week, there is a fish-market and daily exchange held about the Cross.

THE LORDS repelled the reason of reduction.

C. Home, N^o 35. p. 66.

S E C T. XIII.

Apparent Heir's Consent.

1672. *July 16.*GRAY *against* GRAY.

No 103.

A MAN, upon death-bed, disposed his estate to his daughter, (apparent heir) and her husband, in conjunct fee, whom failing, to her husband's heir. The daughter and her husband bruiked the subject several years, and never reclaimed, or raised any process against this death-bed deed ; yet this possession of the apparent heir being under the influence of her husband, was not found an homologation to debar a posterior apparent heir from quarrelling the same.

Fol. Dic. v. 1. p. 219.

* * * See This case Sect. 3. b. t. No 16. p. 3196..

1685. *January 9.*LAURENCE POUR *against* Bailie CHARLES CHARTERIS and AGNES DEANS.

No 104.

A deed was in favour of an immediate apparent heir, whom failing, to strangers. The heir died an infant,

THE LORDS advised the case between Pour and Pour (and Deans.) Laurence Pour is interdicted to sundry persons ; his brother *in lecto* makes a disposition of his estate in favours of sundry persons, with a substitution, and some of the substitutes are Laurence's interdictors. Laurence is moved to ratify it, on this

ground, that there is a liferent left to him; and if he refused to ratify, then, to cut off his pretences, he would go to kirk and market, and thereby validate the disposition, and give him nothing. Laurence now raises a reduction of the disposition, on this head, that the interdictors had impetrated that right to themselves in prejudice of him, their pupil, which is contrary to the fidelity of their office. *Answered*, He was not *alioqui successurus*, there being another brother nearer, and the interdictors are but substitutes, and are but curators upon the matter, *qui magis dantur rei quam personæ*; and their oath is *rem pupilli salvam fore*; and this was not *res pupilli*.—THE LORDS ordained it to be heard in presence.

No 104.
soon after his
father, and
notwithstanding
the heir's,
implied consent,
the next
heir was
found entitled
to reduce *ex
capite lecti*.

1694. July 17.—THE LORDS, before answer, ordained the Bailie's other interdictors to depone, whether the interdiction was cancelled and retired, and then a ratification taken from him in their own favours; and that being over, then the interdiction was renewed, being for expiscation of a fraud; though some contended, that they could not depone in *propriam turpitudinem*, but only on the fact of others, and not on their own: And recalled their former interlocutor, finding they needed not depone, as the interdiction was not registrate; for here the question was not anent the validity of the interdiction, but anent their fraud in putting it out of the way till the ratification was got.

1696. December 25.—THE LORDS advised the reduction pursued by Laurence Pour against Agnes Deans, relict of John Pour his brother, Charles Charteris, and others, *ex capite lecti et circumventionis*, of a disposition made by his brother on death-bed to his prejudice, as heir, and of a ratification he gave when interdicted; and some of his interdictors being substituted, they cancelled that first interdiction till he had once ratified, and then renewed the interdiction upon him, which was contended to be manifest fraud. Against which reduction it was alleged, 1mo, That he had no title to quarrel till he were served heir, not only to his brother John, but to his nephew James. *Answered*, Though the *jus apparentia* was sufficient to sustain his process, yet he now produced a retour to both. 2do, Alleged, That reductions *ex capite lecti* were only allowed to the immediate heir, when prejudged by the disposition; but *ita est*, Laurence at that time was not the immediate heir; but James, son to John the disponer, who is not lesed, because the disposition is to him in the first place; so Laurence being then the remoter heir, though now, by James's death, he falls to succeed to both, yet his contingency at the time of the disposition can only be considered here. *Answered*, The law of death-bed was introduced by us, not only to secure the next immediate heir, but also for the whole heirs indefinitely, and the entire life of succession, else it were very defective; yea, more, if the nearest heir consent to his predecessor's deed on death-bed; and if he die unentered, his next heir will pass by him, and serve to the disponer, and reduce the deed, though the immediate apparent heir at the time consented; and

No 124.

though he does not quarrel the institution in this disposition, because it was to his own son, yet he may well enough impugn the substitution to strangers to his prejudice, who was the next heir failing the disponent's son; and this is not *approbare et reprobare* the same deed, because he is not concerned with the institute, and *utile per inutile non vitiatur*.—THE LORDS considered, if the son, who was institute, had been of age, and entered to the possession, and accepted, there might have been some doubt how far the remoter heir could be permitted to quarrel that right, which had in so far taken effect; but the institute being here an infant, and who outlived his father but a short time, they sustained the remoter heir's interest and title in that case to pursue this reduction. The answer the defenders made to the reason of fraud and circumvention was, that John considered his brother Laurence was a profligate debauchee, who had squandered away his own portion, and would do the like with his estate, if he got it; therefore he told him, if he would not ratify the disposition, (in which he had made him only a liferenter, and substituted sundry friends, as Bailie Charteris, and others, in the fee, failing his son), he would then go to kirk and market, and make it valid without his consent; on which he ratified, and though there was a prior interdiction, yet it was null, being neither published nor registrate; likeas it can only reduce deeds affecting the interdicted person's heritage, but never hinder him to dispoise a *spes successionis*, which, though prohibited by the Roman law, repudiating all pactions *de hæreditate viventis*, yet is not so by ours; and, by the same law, their edicts did not reach those *qui nolunt acquirere hæreditatem sibi delatam*, but only discharges them, *ne patrimonium suum diminuant*, l. 6. D. *Quæ in fraud. creditor.* Replied for the Heir, pursuer, That the ratification was impetrate by plain fraud; for you, who have the benefit of the substitution in the fee after my nephew's death, to my exclusion, saw he was a sickly child, and impossible he could outlive his father long, and who were my interdictors, and should have hindered me from doing so prejudicial a deed as the ratifying that disposition was, yet you persuaded me to it, and, to make it legal, you cancelled the first interdiction, and after I had signed the deed in your favours, you clapped the fetters of a new interdiction on me again, being convinced of my facility and weakness; which contrivance was to make the deed subsist, and is condemned by all lawyers; and though it was not a complete act against third parties, being neither published nor registrate, yet it was sufficient against you who knew it, and who, instead of defending me, led me into the snare.—THE LORDS having read the probation, found none of the interdictors knew any thing of that first interdiction, but only Bailie Charteris; and that his confession might be *exceptio doli personalis* against himself, to exclude him from reaping any benefit by it, seeing *nemo debet lucrari ex suo dolo*; yet it being only a single testimony, it could not prove against the rest, or extend to reduce their shares and proportions of the fee; fraud not being *vitium reale* as *vis et metus* is, but only personal; therefore they thought it a subject

fit for accommodation, and recommended to some of their number to settle and agree the parties. No 104.

This cause being of new advised, on a bill and answers, the plurality reduced the whole on circumvention, seeing *dolus unius alteri non debet obesse nec prodesse*. Against this sentence they appealed to the Parliament. See APPENDIX.

Fol. Dic. v. 1. p. 219. Fountainhall, v. 1. p. 329. 633. & 747.

1728. November 13. REIDS against CAMPBELL.

No 105.

AN heir portioner, in her contract of marriage, having accepted a provision in lieu of all she could ask or crave through her father's decease, as this did not bar her from succeeding as heir *ab intestato*; so the father having disposed an heritable subject upon death-bed, it was not found to bar her from quarrelling the same, though it was pleaded to be equivalent to a consent to the death-bed deed; for the difference is great betwixt empowering one antecedently to do a deed which the law condemns as wrong, and acquiescing in it after it is done.

See APPENDIX.

Fol. Dic. v. 1. p. 220.

1733. December 4. INGLIS against HAMILTON, alias INGLIS of Murdison.

No 106.

A PERSON in *liege poustie* took an obligation in writing from his presumptive heir, not to quarrel or impugn, on the head of death-bed, any deed or settlement which he should make, but, on the contrary, to ratify and approve the same. In a reduction, *ex capite lecti*, at the instance of this presumptive heir, of a death-bed deed, granted by the predecessor in his prejudice, the said obligation was objected to him by way of defence, and the maxim urged, *unicuique licet favori pro se introducto renunciare*. It was answered, *imo*, The law of death-bed was introduced for a protection to dying persons, to guard them from the artifices of cunning men; for, if the heir's interest were only concerned, this consideration would extend to alienations in *liege poustie*, as well as upon death-bed. *2do*, The heir is not at liberty to refuse his consent in such a case; and, if *metus carceris* be a good ground for avoiding an obligation, *metus exhereditationis* is much stronger.—THE LORDS repelled the defence, and found this antecedent consent not sufficient to bar the heir from quarrelling the death-bed deed. See APPENDIX.

An heir was found entitled to reduce a death-bed deed, altho' the granter had in *liege poustie* taken from him an obligation not to challenge any deed of his.

Fol. Dic. v. 1. p. 220.

S E C T. XIV.

Under Sentence of Death.—Effect of Reduction *capite lecti*.—Ratification upon Oath.—Sale for a Reasonable Price.—Equivalent benefit to the Heir.

1593.

CANT *against* RAA.

No 107.

An obligation granted by a man under sentence of death, is no better than one granted on death-bed.

ANE Cant being convict for slaughter, and reddie to tak to the place of execution, his wyffis father, William Raa, in Edinburgh, cam to him, and desyrit him that he wald give him ane obligatioun for the sounge of six thousand merks, quhilk he allegit the said Cant to be auchtand to him, quhilk the said Cant grantit, and thairupon the said Raa causit mak ane obligatioun, subscribit be twa nottars, immediatlie before the said Cant's executioun; thairefter this, Cant's air being persewit upon the obligatioun, *allegit* that it was null, becaus it was onlie subscribit be twa nottars, and the partie could wrytt. *Secundo*, It was subscribit *post contractum capitale crimen, et post latam sententiam mortis*, quhilk was mair nor give it had bene in *lecto aggritudinis*. Quhilk allegiance was fund relevant, and the obligatioun declarit to be of nane avail; reservand to the said Raa his actioun for ony debt that he could pruve *aliunde*.

Fol. Dic. v. 1. p. 220. Haddington, MS. v. 1. No 255.

1677. December 11.

WILLIAM LOCKHART *against* The Legatee of JOHN LOCKHART, his Brother.

No 108.

Reduction upon the head of death-bed takes place only in time coming, and not *quoad* bygone fruits and annual-rents intromitted with by the dispo-

DECIDED and found, a testament could not adminiculate a disposition of heritage, though it spoke his *enix* will, *quia non agit, quod in se erat*; they reduced a provision to his relict of 600 merks, *in toto*, because provided *aliunde*; but reduced only in time coming, and assoilzied from the bygone fruits and annual-rents intromitted with by them; and found, in all sicklike sentences, they must only take place, for the future, where the contrary is not insert in the decret.

Fol. Dic. v. 1. p. 220. Fountainball, MS.

*** See No 78. p. 3297.

1683. February 27.

EARL of LEVEN *against* MONTGOMERY.

No 109.

RATIFICATION upon oath of deeds on death-bed, made by the granter, hinders not the heir to quarrel the same.

Fol. Dic. v. 1. p. 220.

*** See This case Section 7. *b. t.* No 41. p. 3217.

1685. *March.* HARY GRÆME against DOUGLASSES.

MR DOUGLAS having, after he was condemned to die for murder, acknowledged, in exoneration of his conscience, by a declaration under his hand ratified before the justices, that he had raised fire in Hary Græme's chamber ; Hary raised a process of damage against his heirs.

Alleged for the defenders, *1mo*, The defunct was minor, and lesed by that confession ; *2do*, It was emitted without consent of his curators, and so null ; *3tio*, The defunct, after sentence, and before execution, was reputed to be *in lecto agritudinis*, so that he could not prejudge his heir by his confession.

Answered ; Minors cannot revoke confessions of crimes, unless they can *docere de errore* ; *2do*, As minors may commit crimes without consent of their curators, so they may confess them ; *3tio*, The law of death-bed is founded upon the presumption, that persons *ex favore et impatientia morbi*, may be imposed upon to prejudge their heirs ; but here the defunct was in firm and perfect judgment and health. Again, it were absurd if a person condemned for a private crime, acknowledging high treason, might not be indicted again for treason, and forfeited upon his confession. Now, *de facto*, the defunct was indicted again for the fire raising ; and though he was acquitted by an assize, because he did not ratify the said confession before them, yet the declaration before witnesses is not sufficient to infer an obligation for damage ; and if a party on death-bed should judicially acknowledge himself guilty of treason, he might be forfeited for the same after his death.

Replied ; No heir can be directly prejudged by any writ of his predecessor made on death-bed.

THE LORDS found, That Mr Douglas, after sentence, was in the case of death-bed ; and therefore did not sustain process on his confession.

Fol. Dic. v. 1. p. 220. Harcarse, (SUMMONS.) No 913. p. 257.

1724. *July 15.*

AGNES MAXWELL and EDWARD M'CULLOCH, her Assignee, against JAMES CORRIE, Provost of Dumfries, and Others.

EDWARD MAXWELL of Hill, by his contract of marriage anno 1718, ' became bound to settle his estate on the heirs of the marriage ; which failing, ' it was provided to the heirs of his body, by any other marriage ; which failing, ' ing, to his sister Agnes and the heirs of her body ; which failing, to Edward ' M'Culloch the pursuer, and his heirs ; ' with the burden of an annuity of 500 merks to his future spouse, in case she should survive him, and that there were children of the marriage, and of 800 merks if there were none. He also be-

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No 110.

Found as
in No 107.
p. 3328.

No 111.

The Lords found, that a person by a sale in the rational way of administration, might dispose of his woods even upon death-bed ; and the sale being

No 111.

brought under challenge, they reduced it only in so far as the price was taken payable to heirs, executors, or assignees; upon this *ratio*, that the party was obliged by his contract of marriage, to provide his estate, and particularly the woods, according to a special destination therein mentioned.

came bound to dispose of the woods upon his estate, which were of considerable value, ' with the advice of Mr James Elder, husband to his sister Agnes, and ' the said Edward M'Culloch, his own nearest friends, and of Thomas Gordon ' and Joseph Corrie, friends to his spouse, and to lay out the price of them in ' land or other good security, under the same destinations and substitutions ' with his lands, but with a liferent of the third to his spouse in case of children, ' and of the half in case of none.'

After the marriage had subsisted upwards of three years without children, or hopes of any, the husband fell into a languishing state of health, and within less than 60 days of his death, he sold the woods by a private agreement, (having first tried to sell them at a public roup, whereof he had published advertisements both in Scotland and Ireland,) to Provost Corrie, William Martin, John Brown, and John Gordon, for 16,000 merks; and by the contract the price was made payable to himself, his heirs, executors, or assignees.

Thereafter, and but a few days before his death, he made his last will and testament, by which he appointed his spouse his executrix and universal legatrix in all his moveables, and particularly in the price of the woods; and about six months after his death, Provost Corrie married the relict.

Of this contract and testament, in so far as related to the price of the woods, the pursuers raised reduction on the following grounds, *1ma*, That the contract was entered into on death-bed in prejudice of the pursuers, his lawful heirs of blood, as well as by destination; *2da*, Mr Maxwell was fraudulently induced to enter into the contract in his languishing state of judgment, as well as of health, with a view of gratifying and enriching his relict at the expense of his heirs, and this was done by the procurement and participation of the defenders, who bought the wood, and advised the application of the price contrary to the obligations in the contract of marriage, to which they were all witnesses except one, and in the particular knowledge of the terms of it, and of the limitations with respect to the disposal of the price of the wood; and this appeared the more evidently from the sudden marriage of the relict with one of the defenders, whose brother Joseph was one of the trustees named in the contract of marriage, for the due application of the price of the woods; *3tio*, The woods were sold for 16,000 merks, which was one-third under their value; and the effect of the advertisements was fraudulently disappointed by the contrivance of the defenders, in adjourning the sale in order to make way for this private bargain, though there were persons present at the appointment ready to have offered 24,000 merks for the woods; besides, the defenders have in the contract a tack of the grass of the wood; and neither are obliged, (as they ought to have been) to fence the cut parts of the wood from the uncut, nor have they done it, whereby the young wood is almost destroyed:

It was *answered* to the *1st*, That a sale, even of heritage, for an adequate price, was not reducible *ex capite lecti*, much less of woods when they are fully grown and fit to be cut, for then they become of the nature of moveables, at least they may and ought to be sold, and the price falls by law under executry,

in the same way as a person *in lecto ægritudinis* may charge for a sum heritably secured, and make it moveable so as to fall to executors, or may receive payment of it and discharge it, and the money received will belong to the executors; all which is settled in practice, particularly by a decision, Brown against Thomson, No 20. p. 3200. 'where the husband on death-bed received and discharged the tocher, and immediately disposed of it gratuitously to the wife, and the marriage having dissolved by his death within year and day, the heir was obliged to repay the tocher to the relict.'

It was *answered* to the 2d, That there was not so much as one circumstance libelled, notwithstanding the many strong expressions used in the debate, from which there could be the least imposition on the defunct inferred; on the contrary, it seemed evident that he followed his own natural inclination in disposing of a considerable part of his effects to his relict, since he had no children of his own to succeed to him. And as to the defender's knowledge of the limitations contained in the contract of marriage with relation to the disposal of the price of the woods, there was no sort of evidence that they were in the knowledge of them; and though they had been, yet since there were no children of the marriage, these limitations could not hinder the defunct from disposing of the price of the woods even gratuitously. Had there been children, they would have been in some sort creditors, so as to be preferable to gratuitous, but not to onerous disponees of the woods or of their price, and yet the substitutes, being but collateral heirs, would have had no such claim.

Answered to the 3d, That the 16,000 merks was the full value of the woods, and that the appointment, in pursuance of the advertisements, was fairly kept, where the pursuer, Mr M'Culloch, might have been present, having been duly advertised, and that there was not the least ground for the allegation that 24,000 merks were to have been offered; on the contrary, the defenders were willing to give up the bargain upon the first complaint made by the pursuers, and still are willing to do so, though they have been employed these two years in cutting the woods, and are ready to account for every farthing of the price of what has been sold, they being allowed a fifth-part of the 16,000 merks for their own pains and trouble. As to the tack of the grass of the wood during the time of cutting, it was not only customary but absolutely necessary; and as to the making of fences between the cut and uncut wood, that is generally reserved to the proprietor of the wood, who will do it most carefully, and it is not committed to the discretion of the buyers; and therefore Mr M'Culloch has himself to blame if any hurt was done to the young wood, since it was incumbent on him to have made the proper fences.

It was *answered* in general to all the reasons of reduction, That admitting they were well founded, and that the contract was reducible *ex capite lecti*, yet the pursuers had acquiesced in it, and ratified it by deeds of homologation, not only in seeing and suffering the defenders to go on in cutting and selling the wood for near two years without challenge, but by express deeds, viz. missive letters, one of them entreating the defenders to carry off the cut wood so as not to

No 111.

hurt the young growth, and to give access to make the necessary fences; and another begging to save some trees next the orchard; all which necessarily imported their knowledge and acquiescence in the contract now craved to be reduced, and imported a homologation of it on stronger grounds than were sustained by a decision, December 1723, Edwards against Edwards, *voce* HOMOLOGATION, where it was made evident that the contents of the deed found to be homologated, were not known to the party at the time of the deed on which the homologation was founded.

In reply to the acts of homologation it was *contended* for the pursuer, That they could not infer any intention to confirm the defender's right, because he had no process then depending, upon which he might have obtained a stop; and therefore all he could mean was, to prevent further mischief and damage to the young growth and small tuft of trees, of which he was fond.

THE LORDS repelled the defence of homologation, and found the defunct, by a sale in the rational way of administration, might dispose of his woods even upon death-bed; but sustained the reason of death-bed relevant to reduce the contract of sale, in so far as the price was taken payable to heirs, executors, or assignees; and remitted to the Ordinary to hear parties as to the *bona fides* in purchasing the woods to support the contract made by the buyers, so far as concerned the sale, &c.

Reporter, Lord Grange. Act. Dm. Forbes. Alt. Alex. Hay. Clerk, Dalrymple.
Fol. Dic. v. 3. p. 171. Edgar, p. 84.

No 112.

No renunciation or discharge by the heir of the law of death-bed, during the lifetime of the ancestor, can give that ancestor the power of disposing of his property on death-bed, or can bar the son's title to reduce.

1744. November 4. IRVING against IRVINGS and Others.

In the contract of marriage of Patrick Irving younger of Prestonpans, his father Patrick Irving elder, disposed to him certain tenements, which, with 2000 merks, which he acknowledged himself to have formerly received from his father, 'he accepts of in full contentation and satisfaction of all he could any ways ask or pretend to from his father, by virtue of his mother's contract of marriage, or any other manner of way; and in full of all interest, claim or pretence he could pretend to, or claim of his father's estate, personal or real, after his death, excepting his father's good will; and discharges his father and his heirs for ever.'

Thereafter Patrick Irving elder having, while on death-bed, disposed certain heritable subjects in favour of his younger children, Patrick, the eldest son, brought a reduction thereof upon the head of death-bed. And, at first, the LORDS 'Repelled the reasons of reduction,' by a narrow majority, who considered the contract as implying a renunciation by the eldest son of the law of death-bed for an onerous cause, and which ought to be effectual, even though such renunciation, when gratuitous and impetrated by the father, would not be

available; which was said to be the case of *Inglis contra Hamilton*, 4th December 1733, No 106. p. 3827.

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But, upon advising bill and answers, it was *argued*, That the contract did not even imply a renunciation of the law of death-bed, as it only discharges the father of any obligation he might be under to his son by his mother's contract of marriage, or otherways; and renounces all claims that might arise from any obligation of the father's at his death, but by no means bars the son from succeeding to his father in any estate which he should happen not otherwise to dispose of, and consequently, the son must be entitled, upon any legal ground, to quarrel every deed whereby he is debarred from that succession; and *separatim*, that even the most express antecedent consent of the son could not have conferred on the father a power of disposal of his heritage on death-bed; for, that though an onerous cause on the part of the father may support his death-bed deed, as where he is previously obliged to dispoise, yet no clause, however onerous, can be pleaded in support of the son's renunciation of the law of death-bed, as such renunciation is a *non obstante* to the law of the land.

THE LORDS altered their former interlocutor, and 'sustained the reasons of reduction.' See No 49. p. 2304.

Fol. Dic. v. 3. p. 170. Kilkerran, (DEATH-BED.) No 4. p. 152.

1745. July 19. JANET PATERSON *against* AGNES SPREUL.

JOHN PATERSON died of a decay April 1731, leaving issue, two children, a daughter of a first marriage and a daughter of a second. Being upon death-bed he executed a settlement of his whole heritable and moveable estate, to his wife Margaret Spreul in liferent, and his two daughters equally in fee. And he further provides, in case of the decease of his youngest daughter before majority or marriage, that her mother should have an adjudication upon a certain estate named in the deed, at her own disposal.

The younger daughter having died soon after the father, the elder, who became heir in the whole, brought a reduction of her father's settlement, so far as concerned the alienation of the adjudication, being an heritable subject, in favour of the relict. The defence made for the relict was, that the deceased having settled upon his heirs all his moveables, of which he had the disposal even upon death-bed, the heir who is a benefiter by this disposition cannot quarrel the alienation of the heritable subject, which amounts not to the value of the moveables.

This defence, it was *answered*, resolves into a proposition which hitherto has not got the sanction of practice; to wit, that, to the extent of the moveables left to the heir, a man upon death-bed may alien any part of his heritage. This seems not consistent with the maxim, that the law denies liberty to dispose of heritage upon death-bed. Such a deed is null and void, and can infer no war-

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In a deed upon death-bed, a man having settled his moveables upon his heir, an adjudication, conveyed to his wife in the same deed, was supported against a reduction upon the head of death-bed, the moveables being of greater value than the adjudication.

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randice. If so, there is nothing to bar the pursuer from setting aside this deed altogether, so far as regards the heritable subjects, as being *ultra vires*, leaving it to subsist so far as the granter had power.

When this cause was advised, Arniston and Elchies were absent. The President was clear, that the heir could not challenge the disposition being *super tota materia* in her favour. He observed, that the law of death-bed was of old a salutary regulation, when popery and superstition reigned in Scotland; but these having happily lost their influence, that it was rational rather to abridge than to extend this law, being contrary to the great law of nature, *uti quisque legasset de re sua, ita jus esto*. And it carried by a plurality to pronounce the following interlocutor:

‘ Find, That there being moveable subjects, which the defunct was at liberty to have disposed of as he pleased, conveyed by the disposition to the heir, and that these moveables exceed in value the adjudication conveyed to the relict, the disposition is not in prejudice of the heir; and therefore, that she cannot challenge the same upon the head of death-bed.’

This judgment might be right, had not the heir been also next of kin. But to bar a challenge of death-bed, it certainly would not be sufficient to say, that the heir being also next of kin is in possession of the moveable estate, as well as of that which is heritable. Now this, in effect, is the present case. It cannot be thought that the heirs were any way benefited by being dispoonees to the moveables, when they would have succeeded to the moveables though no disposition had been granted.

Fol. Dic. v. 3. p. 171. Rem. Dec. v. 2. No 73. p. 114.

* * * Kilkerran reports the same case.

JOHN PATERSON merchant in Glasgow was twice married, and of each marriage had an only daughter. In the year 1731, while on death-bed, he executed a settlement of the estate, heritable and moveable, upon his two daughters, Janet of the first, and Margaret of the second marriage, with the burthen of the liferent of his wife Margaret Spruel; and further provided, in case of his daughter Margaret's decease before her majority or marriage, that her mother, Agnes Spruel should have the portion she brought at her own disposal, which was the sum of L. 1000 Scots secured upon her father's estate of Blahairn by adjudication.

Margaret having died soon after her father, Janet, daughter of the first marriage, brought a reduction, on the head of death-bed, of the faculty given to the wife to dispose of a sum which stood secured by adjudication.

In this reduction, THE LORDS found, ‘ That there being moveable subjects, which the defunct was at liberty to have disposed of, far above the adjudication in question, conveyed by the disposition to the heir; the disposition was

• not in prejudice of the heir, and therefore she could not quarrel the same on
 ' the head of death-bed.'

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And this notwithstanding it was argued; that though this judgement might be just, had the reason of reduction only been, that the faculty to dispose of the heritable subject was given in a testament, yet the case was different, where the reason of reduction was death-bed: For, as by the law of death-bed, the defunct is presumed *non sana mentis* so far as concerns the disposal of heritable subjects; the question was not, Whether, by the disposition, as comprehending both heritage and moveables, the heir was prejudiced? but, Whether the disposition, so far as it conveyed a faculty to dispose of heritage, was not void, as granted by a person who, *præsumptione juris*, was incapable *quoad* that subject? Which the Lords had no regard to, as an improper conception of the law of death-bed; which though it may proceed on the presumption of incapacity, only restrains deeds in prejudice of the heir, who therefore cannot take by a deed, and, at the same time, reprobate a part of the same deed.

Kilkerran; (DEATH-BED.) No 5. p. 153;

* * D. Falconer also reports the same case.

JOHN PATERSON merchant in Glasgow, by a deed on death-bed, disposed his whole effects, heritable and moveable, to Janet his daughter, and thereby gave to Margaret Spruel his wife 1000 merks, being her tocher, which she conveyed to her brother and sister.

As the tocher had been secured by an adjudication, it was *alleged* it could not be conveyed on death-bed; but THE LORDS found that it was not the precise sum received in tocher and heritably secured that was given, but generally 1000 merks: However, they determined also this other question, How far a conveyance of the adjudication might be effectual in this case, being alleged to be *legatum rei alienæ*, which the executor, who was also heir, was obliged to make good.

Pleaded for the heir; That on death-bed a man cannot dispose of heritables, and she is not obliged to make this good out of the moveable succession, which she might have taken up at law, without using the disposition; besides, this burthen is not charged on the moveables, but an heritable subject is disposed, with regard to which, the presumption is, that the testator was incapable of judging.

Pleaded for the defenders, claimers of the legacy; that when a person leaves a thing which he cannot dispose of, his executor must make it good, especially when he is not ignorant of his own want of property or power; here he was master of his moveables, which he could have wholly disposed of, and yet left them to this pursuer, who cannot divide the deed, and say part of it is to her prejudice, when the whole is so much to her advantage.

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THE LORDS, 20th June, found, 'That there being moveable subjects, which the defunct was at liberty to have disposed of as he pleased, far above the value of the adjudication referred to in the debate, as conveyed in the disposition to the heir, that the disposition was not in prejudice of the heir, and that therefore she could not quarrel the same on the head of death-bed.'

Pleaded in a reclaiming bill, That this interpretation would elude the law annulling deeds on death-bed, which infer no warrandice, and therefore are not to be made good; and there is no difference betwixt the case of a person burthening his heir by a deed on death-bed, to whom he lets his moveables fall *ab intestato*, as being also his next of kin, and this, where they are disposed; since it is in the power of an executor next of kin to neglect the disposition in his favours, and take up the effects *ab intestato*.

Answered, There is a manifest difference betwixt these cases, as the executor named, could not, by neglecting the disposition and setting up another title, free himself of the burthens therein L. 29. t. 4. D. *Si quis omitta causa testati*: And the burden on death-bed is at worst *legatum rei alienæ*, which though ignorantly done, behoved to be made good to a wife L. 10. Cod. *de legatis*, 2d December 1674, Cranston against Brown, *voce* QUOAD POTUIT NON FECIT.

THE LORDS adhered.

Act. H. Home & Wallace.

Alt. A. Hamilton & W. Grant.

Clerk, Gibson.

D. Falconer, v. 1. p. 123.

SECT. XV.

How the Sixty Days are to be computed.

1793. December 10.

Sir JOHN OGILVIE, and Others against CATHARINE MERCER, and Others.

No 114.

A deed reduced as made on death-bed, where the granted survived its execution fifty-nine days and three hours.

ROBERT MERCER, on 22d February 1791, at eight o'clock in the evening, executed a deed of entail of his lands of Lethindy, in favour of Catharine Mercer his niece, and various substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.

Sir John Ogilvy and others, his heirs at law, (as representing deceased sisters,) brought action against Miss Mercer, and the other substitutes in the entail, for setting it aside, because Mr Mercer had not survived its execution for the space of sixty days, in terms of the act 1696, c. 4. In defence, Miss Mercer *first*

Pleaded; The law of deathbed, as being a restraint on that freedom of disposal which is the essence of the right of property, must be strictly interpreted; Tailziour, No 95. p. 3317. And whatever may have been the case at a former period of society, when perhaps, had it not been for this law, the clergy would have employed their influence with dying persons, in prevailing on them to leave their fortunes to pious uses, to the prejudice of their near relations, and when it was the object of the law to prevent as much as possible the vassal from alienating his benefice without the consent of his superior, Craig, b. 1. d. 12. § 36.; Stair, b. 4. tit. 20. § 38.; No 113. p. 3333.; in the present age, no plea of expediency can be urged in its favour. The act 1696, therefore, though correctory in its nature, yet being highly expedient in itself, ought to receive that interpretation which is most consonant to its spirit, and most favourable to the granter of the deed, for whose benefit it was intended; Mackenzie's Observations, p. 410.; 22d Nov. 1748, Sutherland against his Father's Creditors, *voce* HEIR APPARENT.

Now, reckoning from the 22d February, the date of the entail, to the 22d April, the day of Mr Mercer's death, he lived sixty days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur*. This maxim is strongly founded in reason, and clearly established in our law; Stair, b. 2. tit. 8. § 34.; February 25. 1680, and 7th June 1681, Weddel, *voce* DIES INCEPTUS; Lady Bangour against Hamilton, No 22. p. 248.; Wilson against Haddo, No 46. p. 647.; Elliot against Ferguson, *voce* MEMBER OF PARLIAMENT; Telfers against Ferrier, *IBIDEM*; mentioned in Wight's Treatise of Election Law, p. 221.; in the civil law, *Voet, lib. 44. tit. 3. § 1.*; *Vinn. ad. Inst. lib. 1. tit. 23. p. 100.*; *lib. 41. t. 3. l. 6. et 7. ff. de usurp. et usucap.*; *lib. 44. t. 3. l. 15. ff. princip. de divers. temp. prescrip.*; Grotius Comment. on Matthew, c. 12. v. 40. *lib. 40. t. 1. l. 1. ff. de manumissionibus*; and likewise in the law of England, Viner, vol. 20. p. 269. *voce* TIME.

It is seldom possible to ascertain with perfect accuracy the precise moment at which any given event or transaction took place; and when, in order to make it effectual, it is necessary that it should have happened at a particular period, the cast of the balance is *in dubio* to be given where the favour lies. Accordingly, Ulpian, *lib. 28. t. 1. l. 5. ff. qui test. fac. post.* lays it down, that if one born on the 1st January make his will on the 31st December of his fourteenth year, at any time after midnight, the deed will be valid, which is, in other words, saying, that the day of the birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

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Indeed, it is a general rule in all cases where the period is measured by days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2. p. 268.

The 'year and day,' so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would, in many cases, have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered; There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the foundation of the law of death-bed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib. 2. c. 18. § 7*. Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; Dirl. *voce* LEGITIMA LIBERORUM; Craig, *lib. 1. d. 12. § 36.*; *lib. 2. d. 1. §§ 18. 28.*; Stair, b. 4. tit. 20. §§ 38. 41. and 44.; Macdowall, vol. 2. p. 412. § 17.; p. 301. § 32.; Erskine, b. 3. tit. 8. § 95.; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Shaw, No 32. p. 3208; Lord Cranston Riddell against Richardson, No 35. p. 3212.; Spottiswood, *voce* HEIRS, p. 143. 30th July 1635, Heir of Pencaitland against Sinclair, (in the Appendix to this title).

Hence acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; Lawrie against Drummond, No 96. p. 3319.; Creditors of Balmerino against Lady Coupar, No 77. p. 3292.; Keirie against Craigengelt, No 100. p. 3321.; Clelands against Cleland, No 87. p. 3305.; Stair, b. 3. tit. 4. § 28.

And, for the same reason, the COURT have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of death-bed; Durie, 7th July 1629, Maxwell against Fairlie, No 84. p. 3303.; Laird of Luss against Carden, No 89. p. 3310.; Nicol against Johnston, No 88. p. 3309.; A. S. 29th February 1692. See APPENDIX.

The act 1696, c. 4. being correctory in its nature, and more particularly as limiting the right of the heir, the exceptions against which, even at common law, are strictly interpreted, must not be extended beyond the strict letter; Blair against the Magistrates of Edinburgh, *voce* DIES INCEPTUS. The de-

fender therefore, as she pleads upon it, must shew that its condition has strictly and literally taken place, by proving that Mr Mercer 'lived for the space of three score days' after making the entail. But this she cannot do; for whether the time he survived, be computed *de momento in momentum*, or *de die in diem*, it amounts only to fifty-nine days and three hours.

Neither can the maxim *dies inceptus*, &c. aid the plea of the defender, as it applies only *in favorabilibus*; and, in this case, it is not the disponent, but the disposer and his heir at law, who are the *personæ prædilectæ*. Indeed, the maxim itself seems rather to be an exception, than a general rule. It does not apply to obligations, for there the granter may perform during any part of the last day mentioned in his stipulation, § 2. *Inst. de verb. oblig.*; lib. 3. t. 16.; l. 42. *ff. de verb. oblig.* Nor to prescription; *Voet.* § 1. *ad tit. de diversis temporal. præscript.*; l. 6. *ff. de oblig. et action. lib. 45. t. 1.*; *Voet. lib. 4. t. 4. § 1, ad tit. de minor. 25. annis.*; to which the limitation of the act 1696 is extremely similar, as, in both, a right is lost by the lapse of a definite period.

The cases too in which the rule *dies inceptus*, chiefly applies, are those where some act is to be performed within a year and day; in which case, the day is added *in majorem evidentiam*, that the year itself is completed, and therefore the running of any part of the day is sufficient; Mackenzie Obs. on 1661, chap. 62. 1st Parl. Charles II. sess. 1.; Erskine, b. 1. tit. 6. § 42. And in all other instances where the maxim takes place, there are reasons for it which do not apply to the present question. Thus, if a landlord survive any part of the day on which his rents fall due, his right to them is as complete as if he had outlived the whole; because it was lawful for his tenants to have paid him at any hour of that day; 21st February 1609, Lord Merchiston against his Brothers *voce* TERM LEGAL AND CONVENTIONAL; 8th December 1704, Paterson against Smith, *IBID*; see also 22d February 1740, Executors of Mrs Leith, *voce* DIES INCEPTUS.

Indeed, the statute itself, by declaring that the granter must live for three-score days after granting the deed, excludes any interpretation which is to shorten the *tempus lege præfinitum*. If the Legislature had declared it sufficient that the granter should live for the space of one day after making the deed, the maxim of *dies inceptus* could not surely have applied; because, if it did, the deed would be valid the moment it was executed; and, it is equally contrary to the words and spirit of the statute, to render a deed effectual, where the granter has only survived fifty-nine, the law requiring that he should live for sixty days after its execution.

THE LORDS, after a hearing in presence, ordered memorials. When they were advised,

Two of the Judges were of opinion, That in the present state of manners, the plea of favour lay for the *facultas testandi*; and that, therefore, the defender was entitled to plead the maxim, *dies inceptus*, &c.; and that, as the Legisla-

No 114. lature had not adjected a day to the sixty *in majorem evidentiam*, it was sufficient to validate the entail, that Mr Mercer had lived till the commencement of the sixtieth day.

A majority of the COURT, however, thought that the deed ought to be reduced. It was *observed*, That in this case it would not be necessary to enter upon the question, Whether the plea of favour was on the side of the heir, or of the disponee? There being no instance in our law, of the maxim *dies inceptus* taking place where time is computed by *days*. Its operation is strictly confined to cases where time is measured by *years*, and even then it has place only *in favorabilibus*. Thus, in the *induciæ* of summonses, where time is computed by *days*, it is established, that either the day of citation or the day of appearance must be free. If the statute had indeed declared the granter's living to the sixtieth day sufficient, the defence might have been good; but it requires, that the granter shall live for the space of sixty days; and, even counting the day Mr Mercer executed the deed, as one day, he only survived fifty-eight more. So far, therefore, from its being obvious to a plain understanding, that Mr Mercer lived sixty days, there is no way to make that out, but by having recourse to violent fictions, contrary to acknowledged facts, viz. by holding the deed to have been executed before it was executed, and Mr Mercer to have survived his own death.

THE COURT, 30th May 1793, 'sustained the objection to the deed of tailzie, dated the 22d February 1791, That the said Robert Mercer did not live sixty days after the execution of that deed.'

And, on advising a reclaiming petition, with answers, they adhered.

Miss Mercer, in the *next* place, founded on a deed executed by Mr Mercer, on the 21st day of February; and so confessedly not falling under the law of death-bed.

By this deed, Mr Mercer, in the *first* place, gives the liferent of part of the estate of Lethindy to a natural son; and, in order to make the grant effectual, he 'binds and obliges himself, and *his heirs of tailzie and provision*, &c. to sub-scribe and deliver all writs and deeds requisite,' &c. He then grants certain annuities, with which he burdens his heirs of entail in the following terms: 'And I hereby bind and oblige me, and *my said heirs* succeeding to me in my said lands, to pay the following persons the free yearly annuities after mentioned,' &c.

Then follows this clause: 'And I do hereby recommend to *Miss Catherine Mercer, who is the first heir appointed to succeed me*, to pay to Charles Mercer, residing at Meikleour-house, the sum of L. 100 Sterling, and that at the first term of Whitsunday or Martinmas that shall happen next after my death: And further, as James Miller, writer at East Hatton, has been for this considerable time past employed in the management of my affairs, and in carrying on my business, I do hereby recommend to the said *Miss Catherine Mer-*

‘cer, and the other heirs upon which my lands and estate may devolve, still to continue him in the management and transacting of the business of my said lands and estate.’

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It appeared from the evidence of the writer, that both this deed and the entail had been prepared in consequence of final instructions received by him from Mr Mercer, on the 19th February; and that the drawing and executing them had been his sole business from that day till their execution.

Miss Mercer *contended*, That this deed afforded her a twofold defence against this reduction, and,

Pleaded; 1st, The entail of the 22d February, and this deed are parts of the same family-settlement, just as much as if the contents of both had been engrossed in one paper. Now, in questions like the present, the date of *commencing* the execution of one general settlement, whether contained in one or in separate papers, is to be considered as the date of the whole.

But, 2dly, The deed of the 21st February, taken by itself, is sufficient to exclude the reduction; because the defender is there expressly declared Mr Mercer's heir, and any solemn written declaration of the proprietor's intention, though it may not operate as a direct conveyance, is sufficient to create an obligation upon his heirs at law, to give effect to it by an after formal deed; 13th July 1722, Kennedy against Arbuthnot, *voce* VIRTUAL; 31st January 1667, Henderson against Henderson, *voce* TESTAMENT. Mr Mercer, however, in place of leaving his intention to be fulfilled in this manner, carried it into effect himself, by his entail of the 22d February; and, as these repeated acts show a more deliberate intention than could appear from any one deed, they must greatly strengthen that legal favour which is always due to the deeds of a person rationally disposing of his property, *l. 15. Cod. de test. (lib. 6. t. 23.)*

Answered; The deed of the 21st of February speaks of the defender as already appointed to succeed, and of settlements then made; it therefore cannot apply to a deed to be afterwards executed. But even if it did refer to the entail, the two deeds cannot be considered as *partes ejusdem negotii*; as the one is a conveyance of a landed estate, and the other merely a settlement of moveables. And if the alleged *institutio hæredis* in this last were good for any thing, Miss Mercer would take the estate in fee simple, while, by the deed of the 22d, it was conveyed to her under the fetters of a strict entail.

Granting, however, that the two deeds were to be viewed as *partes ejusdem negotii*, that of the 21st February cannot give validity to the entail. It is only in questions of interpretation, in order to discover the true import of a deed, that it is either necessary or legal to consider other deeds relative to the same matter. But the point at issue is not respecting Mr Mercer's *intention*, but respecting his *power*, and therefore the entail cannot be affected by any relative deed.

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Besides, were the two deeds to be held as the same settlement, it could not be regarded as complete, till the date of the last deed, and thus, both would fall under the law of death-bed.

2dly, Heritage cannot be alienated, unless by a deed *inter vivos*, and containing dispositive words. The deed of the 21st February was granted by Mr Mercer *mortis causa*, and the signification of all which it is supposed to contain in favour of Miss Mercer, being of a testamentary nature, is altogether ineffectual for that purpose; 18th January 1764, Burgess against Stantin, *voce* FOREIGN. Besides, the clause in which the defender is mentioned as his heir, was introduced merely historically, and by no means *eo intuitu* of vesting her with that character, and a reference of this sort was never held in our law to be a sufficient *institutio hæredis*.

Replied; Although the entail was made on death-bed, yet the defender, as a *hæres facta*, is not entitled to challenge it on that ground. Besides, the entail is to be considered as a restriction of the deed of the 21st February; and although Mr Mercer does not there reserve any power of making such limitations, yet he was entitled to do so in the last hour of his life, for the same reason that a person on death-bed, making a deed, without a clause dispensing with the delivery more than sixty days previous to his death, may deliver it validly, or make a codicil, dispensing with the delivery at any time before he dies.

After hearing counsel on this branch of the cause, it was

Observed on the Bench; The two deeds are no doubt so far *partes ejusdem negotii*, that both were intended to regulate Mr Mercer's succession; and if they contained any doubtful clause, recourse might be had from the one to the other, to get at his intention. But this is a question not of *will*, but of *power*. The deed of the 21st February, therefore, if considered as referring to the subsequent entail, cannot possibly support it; because, in that view, it would form a part of it, and so must stand or fall along with it, being a mere relative deed, according to the maxim, *Nihil intelligitur actum dum quid superesset agendum*.

THE COURT were unanimous in this opinion; and a majority also thought that the clause of the deed 21st February was of itself insufficient to convey the estate, both because it was evidently not inserted *eo intuitu* of making a settlement upon Miss Mercer, and because, even supposing it had, the words, 'who is the heir first appointed,' &c. would not have been sufficient for that purpose, the principles of our law rendering dispositive words essential, unless in the exercise of reserved faculties.

THE COURT found, That the deed 'executed by the deceased Robert Mercer, of date 21st February 1791, is not effectual to convey the lands and other heritable subjects which belonged to Mr Mercer, in favour of the defenders, or any of them, nor to support the deed of entail executed by him on the 22d of said month of February.'

Lord Ordinary, *Alva*. Act. Lord Advocate Dundas, Rolland, W. Robertson, Arch. Campbell, junior.
Alt. Solicitor-General Blair, M. Ross, Tait, Hagart. Clerk, Mitchelson.

R. D.

Fac. Col. No 84. p. 181.

* * * This cause was appealed :

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The House of Lords, March 1. 1796, ' ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed.'

* * * The ground of the decision of the House of Lords, relative to the computation of the time, it is believed, was this : The *terminus a quo*, mentioned in the act, is descriptive of a period of time, viz. the date or day of the death, which is indivisible; and 60 days after, is descriptive of another, and subsequent period, which begins when the first period is completed. The day of making the deed must, therefore, be excluded; so the maker lived only 59 days of the period required. Had he seen the morning of the subsequent day, the rule of law would have applied, *Dies inceptus pro completo habetur*, which makes it unnecessary to reckon by hours.

* * * This rule was applied in the case of Mitchell against Watson, decided in February 1801, (in the Appendix to this title,) in which it was found, that, in computing the 60 days, the day on which the deed was executed not being included, it was sufficient for supporting the deed, that the granter lived till the morning of the 60th day.

No recourse upon a death-bed deed, against the dead's part. *See QUOD POTUIT NON FECIT.*

The Heir's personal creditor, whether entitled to insist in a reduction upon the head of death-bed. *See PERSONAL AND TRANSMISSIBLE.*

Deeds on death-bed, how far probative. *See PROOF.*

See HOMOLOGATION. See TITLE TO PURSUE. See COMPETENT.

Observe the following cases, connected with the title DEATH-BED.

Calderwood against Shaw, 14th November 1668, Stair, v. 1. p. 562., *voce PROOF.*

Heir of Geo. Heriot against his Creditors, 23d February 1676, Stair, v. 2. p. 420., *voce TITLE TO PURSUE.*

Trotter against M'Kello, 18th February 1676, Stair, v. 2. p. 418, *voce PERSONAL AND TRANSMISSIBLE.*

Gray against Gray, 25th July 1672, Stair, v. 2. p. 109, *voce FIAR.*

Heir of Pencaitland against Sinclair, 30th July 1635, Spottiswood, p. 143, in the Appendix to this title.

Paton against Paton, 26th November 1674, Stair, v. 2. p. 284, *voce PROOF.*

Home against Bryson, *voce BANKRUPT*, No 4. p. 881.

Beattie against Roxburgh, *voce CONQUEST*, No 21. p. 3067.

Nicolson against Burnet, Durie, p. 810. 7th July 1636, *voce GROUNDS AND WARRANTS.*

Donaldson against Donaldson, 24th Feb. 1624, Durie, p. 113. *voce* HERITABLE AND MOVEABLE.

Creditors of Balmerino and Couper against Couper, 16th February 1669, Stair, v. 1. p. 605, *voce* PROOF.

Carmichael against Dempster, 28th November 1676, Stair, v. 2. p. 469, *voce* MUTUAL CONTRACT.

Colvil against Colvil, 14th Dec. 1664, Stair, v. 1. p. 241, *voce* TESTAMENT.

Ker against Kers, 25th January 1677, Dirleton, p. 216, *voce* PRESUMPTION.

— against Tait, 6th February 1677, Dirleton, p. 219, *voce* LEGACY.

Elies against Watson, 5th February 1712, Forbes, p. 583, *voce* WRIT.

Campbell against Campbell and Stewart, 17th January 1749, D. Falconer, v. 2. p. 40, *voce* HUSBAND AND WIFE.

Courtie against Cunninghame, 16th Jan. 1627, Durie, p. 256, *voce* PROCESS.

French against E. of Wemyss, 25th July 1677, Stair, v. 2. p. 549, *voce* PROOF.

Paton against Stirling, 20th Dec. 1671, Dirleton, p. 63, & 75. *voce* PROOF.

Haliburton against Haliburton, 31st July 1666, Dirleton, p. 16, *voce* HOMOLOGATION.

Yeoman against Yeoman, 7th June 1676, Stair, v. 2. p. 423, *voce* FACULTY.

Keith against Seton, mentioned p. 1675.

See APPENDIX.

APPENDIX.

PART I.

DEATH-BED.

1776. July 9. JOHN FAICHNEY, and his Curators ad-litem, *against* WILLIAM and GEORGE FAICHNEY, Merchants in Perth.

THE deceased Mr. Faichney, Minister of Collace, about a month before his death, disposed to the defenders William and George Faichneys, his brothers german, equally betwixt them, the lands of Cowbyres of £85. 10s. Sterling of yearly rent, besides certain tenements in Perth, worth about £400, but under the burden of £800. Sterling to his nephew and heir at law John Faichney, the pursuer, and his Brothers and Sisters, who were eight in number, equally among them.

The Rev. Mr. Faichney having died at the age of 66 years, and about a month after granting this disposition, his heir at law, insisted in a reduction of this deed upon two grounds,—Incapacity of the granter,—And his not having survived the execution of the deed for sixty days, which rendered it reducible *ex capite lecte*. A proof having been allowed to both parties, it appeared that no actual incapacity could be established against the deceased; that he was considered to be in a dying condition before the execution of the deed; that at that time he laboured under the indisposition which terminated in his death, being a general decline of nature, with some appearance of a paralytic disorder, and that he died within a month after executing the deed; but that he was perfectly sensible when the deed was executed, and had afterward continued to transact some of his ordinary business, and had been both *at church and market* subsequent to that period: It was, however, at the same time proved, that he had not gone to Church and market in a convalesced state, but, as he expressed himself, “in order to confirm his will.”

No. 1.

Whether being at church and market is to be considered as *probatio probata* of convalescence?

No. 1. The Court, in judging of memorials upon this proof, pronounced the following interlocutor, (20th January 1776): “ Having advised the state of the process, testimonies of the witnesses adduced, writs produced, memorials *hinc inde*, and heard parties procurators thereon, they repel the reasons of reduction, assoilzie the defenders, and decern.”

The heir at law, however, stated in a reclaiming petition, That the law of death-bed is not at all founded upon the idea of an actual incapacity in the granter, because actual incapacity is a good ground of reduction at whatever time the deed is executed; so that if it was requisite, there would be nothing peculiar in the law of death-bed. Moreover, it has been found that where actual incapacity is not proved, a *settlement of moveables*, however valuable, will be sustained, though executed the last hour of a man's life. Neither is it necessary in a reduction *ex capite lecti* to prove that any undue means were used for obtaining the deed. These means are always used in the most secret manner *inter privatas parietes et remotis arbitris*; so that a proof that they were really practised in obtaining settlements becomes in most cases impracticable. This very evil was one of the chief inductive causes of establishing the law of death-bed, which has in general established a legal incapacity in dying persons to dispose of their heritage as the most effectual method of preserving the peace and quiet of persons in that situation against improper importunity and solicitation, which in many cases might be attended with the grossest injury and injustice to them and their representatives.

It is likewise nothing to the purpose although there should be the clearest proof of an *entire voluntas* upon the part of the testator to execute and support the settlement: For the law of death-bed does not at all proceed upon the idea that the deed was not the will of the defunct. If it could be shown that such was the case at any period, it would be a sufficient ground for setting aside the settlement, even although the granter was in perfect health at the time the deed was executed. In the same way the rationality of the deed is totally out of the question; for as a reduction *ex capite lecti* is founded on the want of power in the defunct, rationality can be no reason for supporting a deed which the granter had no power to make. Thus, it is held to be established law, that bonds of provision in favour of younger children, if executed in death-bed, cannot be supported to the prejudice of the heir, although it cannot be disputed, that such bonds are of all others the most rational deeds.

In establishing death-bed, it is by no means necessary to prove that the person was at the time labouring under a *morbus senticus*: It is of no moment what was the nature of the distemper, or, whether it was a violent or a lingering disease, provided it ended in death. So that before the act 1696, a man might have been on death-bed for several years. This doctrine is accordingly so laid down by Lord Stair. “ That it is not necessary to allege or instruct that it “ was *morbus senticus*; January 7th, 1624, Shaw *contra* Gray, No. 32. p. 3203; “ neither that the defunct was bedfast when the deed was done; February 1st,

No. 1.

"1622, Robertson *contra* Fleming, No. 73. p. 3290." If so stood the law before the act 1686, when a person might have been whole years upon death-bed, how much more so must it necessarily stand now when that period is limited to sixty days? When a person therefore is in a sickly state, and is declared by his physicians and persons around him "to be in a *dying state*," it is of no moment whether it was old age or any other disease or infirmity under which he laboured; and so it has been found by the decisions of the Court, 30th July 1685, Richardson Lord Cranstoun *contra* Sinclair, No. 34. p. 3210: where a sale of lands made by a person paralytic a year before his death, and when he was *sound in judgment and understanding, and in the constant exercise of managing all his affairs*, was found reducible *ex capite lecti*, unless he had come abroad after it. And in another reduction *en capite lecti*, it was offered to be proved, that, though the defunct was confined to the house, having broken his legs so that he could not go to kirk or market, he was notwithstanding in perfect health when he granted the bond, but this defence was repelled; 28th February 1668, Dun against Duns, No. 76. p. 3291. As therefore it is proved that the defunct laboured under the disease of which he died before executing the deed, the question comes simply to this, whether he had legally and properly convalesced before his death? Now here it is to be recollected, that the going to church and market does nothing more than establish a presumption of convalescence, but the presumption from thence arising is not a *presumptio juris et de jure*; because private and domestic acts, however much they may indicate health in the party, are not admissible as a proof of convalescence. The law, in order to prevent the true state of the person from being disguised by partial witnesses, has required that he be exposed to public view, that his true state and condition may be judged of by impartial and unsuspected witnesses; so that the pursuer of the reduction may have it in his power to prove, that notwithstanding of going to church and market, yet the person still laboured under the disease, if the fact really stood so.—This is clearly laid down by Lord Stair, B. 4. Tit. 20. § 46.—"The defence of public appearance presumes convalescence, unless the contrary appear, as if there were evident tokens of the continuance of the sickness either by the view of the party's countenance, or by fainting and vomiting in going or returning." This same doctrine also is clearly supported by Lord Fountainhall in his observations subjoined to the decision, 5th December 1711, Crawford *contra* Brichen, No. 91. p. 3312. where he supposes the very strong instance of a man, during the paroxism of a raging fever, having run to kirk and market after a disposition signed by him, but which there can be no doubt would not have the effect of validating the settlement. If the going to church and market established a presumption of convalescence *presumptio juris et de jure*, it would lead to the most absurd consequences.

As therefore it evidently appeared by the proof, that the defunct looked very ill in church; and instead of appearing to be in a state of convalescence,

No. 1. the witnesses state that he "had a dying appearance," and "that he looked very ill, and like as if death was coming on him;" the result arising from his appearance on this public occasion must have been, that he had not convalesced, but laboured under the disease of which he died.

Besides, the very mode in which the going to church and market was performed, is not sufficient to afford even presumptive evidence of convalescence. It is here necessary to observe, that there is a very material difference whether the going to kirk or market was occasional and a matter of course, or whether it was done for the very purpose of supporting a deed recently made. This distinction is clearly marked by Lord Stair, B. 3. Tit. 4. § 28. "But where the kirk and market is upon design, the least defect in the exact performance will render it ineffectual." And so in the case of the disposition made by Lord Cupar, June 28th, 1671, No. 77. p. 3292. it having been evident that it was of design to validate the disposition, that the next day after the disposition my Lord went to the market at Cupar; the laying his hand upon Thomas Ogilvie's hand who walked by him, and that only at some times, and in rugged places, where he was accustomed to take any walking by him by the hand before; yet, seeing he put nature to the utmost stretch to manifest health by that act, and could not fully perform it, it was not found sufficient, but he "was found to be supported."

In this case it has been proved, that the defunct, although he had been in use to go to church on foot, yet had gone on horseback on that occasion, and that he received assistance, both in mounting and dismounting, which he never before had received. That he did not come in till near the middle of the lecture, and had gone out before the end of it; and that when he went to market, he was put upon his horse by assistance, and never dismounted until he was taken off his horse at home, so that his horse only walked through the market and returned, which so far from affording evidence of health and convalescence, proves the very reverse, and shows that after *putting nature to the utmost stretch*, he could not effectuate what he intended. There was therefore clearly a defect in the exact performance, which must render the attempt ineffectual, for when the law has pitched upon the going to church and market as a proof of health, it necessarily supposes that the act must be performed in the same manner as it is done by a person in health, and particularly by that person who is attempting to validate his settlement thereby.

It was answered by the disponees, That the only disease or symptoms of a disease, under which the defunct seemed to labour at the period of executing the settlement in dispute, amounted to nothing else, than the gradual decay of nature. That old age is properly no disease; and that therefore, as the defunct continued to transact his ordinary business after granting this disposition, he cannot be understood to have laboured under such a disease as the law of death-bed meant to speak of.

But even supposing that the defunct had laboured under the disease of which he died, at the time of executing his settlement, yet as he afterward appeared to have been of sound understanding, and to have transacted his ordinary business, these circumstances, established by a variety of unsuspected witnesses, are equipotent to the legal proof of convalescence by being at church and market. But, besides, the legal acts of convalescence themselves being proved must beyond all doubt validate this settlement. The pursuer has endeavoured to avoid the force of the defunct's having been at church and market, by insisting that it only affords a *presumptio juris* of his convalescence, and not *presumptio juris et de jure*. In short, that such public acts may be redargued by a contrary proof, showing that in spite of that public appearance, the defunct still continued to labour under the disease of which he died. The authorities quoted by the pursuer on this subject seem only to amount to this, that the going to kirk and market must not be the effect of the very disease, under which the granter of the deed laboured at that time. But the law does not require, in order to validate a settlement, that the person who makes it should be restored to a complete and confirmed state of health: Nothing more is required than that he should survive sixty days, or go freely and unsupported to kirk and market. Now, agreeably to the pursuer's doctrine, the going to kirk and market would be of no avail, unless it could at the same time be proved that the disease was completely cured. But such an inquiry is hardly possible, and the going to kirk and market is held as the legal proof of convalescence for the very purpose of excluding all such disquisition. Going to kirk and market, then, freely and unsupported, by a person in the knowledge of the acts he has performed, is *probatio probata* of such convalescence, as is sufficient to bar a reduction *ex capite lecti*. This doctrine is accordingly so laid down by all our lawyers. Lord Bankton, B. 3. Tit. 4. § 41. observes, "That if the going to the church and 'market' is proved, convalescence in the judgment of law is thence inferred, though the party continued sickly to his death, and never actually recovered, unless undoubted symptoms of disease at the very time of performing such act inferring convalescence appeared." Both Lord Stair, B. 3. Tit. 4. § 28. and Mr. Erskine, B. 3. Tit. 8. § 96. seem to be of the same opinion. Agreeably to these principles also, in a case Pargilles against Pargilles, observed by Lord Stair, No. 85. p. 3304. the point seems to have been fully established: "The defunct having gone several times to the market, and walked there unsupported, and other times abroad after the disposition challenged, sometimes a foot, and sometimes on horseback; this was found relevant to elide the reasons of reduction on death-bed, notwithstanding of his being helped up and down stairs, and to and from his horse, and by leading his bridle, and that notwithstanding he continued sickly till his death."

It is evident, then, that the going to church and market being held as the legal proof of convalescence is founded upon this circumstance, that by such a public exhibition, both the situation of any person's body and mind may be

No. 1. clearly discernible by a number of unsuspected witnesses, who can easily discover whether these acts of convalescence are the free and voluntary acts of the person himself, or if he is a mere machine, carried and supported by others. Now, none of the witnesses even insinuate that Mr. Faichney was not in the full possession of himself, and in the full knowledge of the acts he was performing at the time they saw him at kirk and market.

With regard to the defunct's having gone to church on horseback, and received some assistance in mounting and dismounting, it was answered, That the going on horseback could be no objection; and that there was nothing extraordinary that an old man at sixty-six, who happened likewise to be a very bad horseman, should have received a little assistance in mounting his horse. When the law talks of going to kirk and market, freely and unsupported, it does not mean every incident of natural and ordinary assistance, such as every man at the same period of life might take.

As to Mr. Faichney's not having remained in church during the whole service, it does not seem to have arisen from any pressure of disease, but from mere conveniency. And there is not a single word either in the statute 1696, in the act of Sederunt 1692, or in the writings of any of our lawyers, from which it may be inferred that the grantor of the deed should remain in church during the whole course of the service.

Mr. Faichney fulfilled both the words and the spirit of the law. He went to church unsupported, and he remained long enough for the observation of the congregation; so that he believed he had done every thing which the law could require for validating his settlement.

The pursuer has made a distinction, taken notice of by our lawyers, betwixt the going to kirk and market being occasional, and its being done for the purpose of supporting a deed recently executed. The jealousy of the law, no doubt, presumes that persons who could impetrate a deed in their favour, could also prevail upon the grantor to perform the mechanical part of going to kirk and market, and therefore it strictly examines whether such performance is his own free and voluntary act, or whether he is supported and carried there by others. But if his freely performing these acts arose from an inclination to validate his settlement, certainly the *enika voluntas* of the testator is to be favourably construed in support of the deed.

As the going either to church or market will establish convalescence, any one of them is sufficient. And therefore with regard to Mr. Faichney's appearance in the market, it is only necessary to observe, that although he did not alight there, still he answered the object of the law by exhibiting himself to the numerous spectators.

The Lords, 9th July 1776, altered their former interlocutor, reduced the disposition, and decerned and declared accordingly.

Act. M^cQueen and Nairn. Alt. D. Dundas. Agent, A. Elphinstone. Clerk, Campbell.
D. C.

1799 November 26.

ELIZABETH BISSET against GEORGE and JAMES WALKER.

ELIZABETH and MARGARET BISSET, two sisters, purchased a house, offices, and garden, from their joint funds, and took the rights to themselves, and "the longest liver of them two, their heirs and assignees."

They afterwards, by a joint disposition *mortis causa*, conveyed them to George and James Walker.

At this time Elizabeth was on death-bed. Margaret survived her sister about three years, and died without serving heir to her.

After Margaret's death, Elizabeth Bisset, the niece and heir-at-law of both sisters, brought a reduction of the disposition, on the general grounds of fraud, imbecility, and lesion, and also in so far as related to Elizabeth's share, as being executed on death-bed.

After a hearing in presence, on a proof, the Court (24th May 1799) repelled the whole reasons of reduction as to Margaret's half, and ordered memorials on the objections peculiar to Elizabeth's.

In a petition against this interlocutor, the pursuer argued the whole cause.

On the question of death-bed, she

Pleaded: If the expression "longest liver of them two," had not been inserted in the disposition, a conjunct fee would have been vested in the sisters, of which each would have transmitted her own share to her separate heirs; Craig, B. 2. D. 3. § 19. Bankt. B. 2. Tit. 3. § 113. Stair, B. 2. Tit. 3. § 42. The expression in question merely denotes, that the survivor was to have a total liferent. Each might have burdened or disposed of her own half during their joint lives.

The expression "their heirs," in grammatical construction, means heirs of each. And as both parties contributed equally toward the purchase, and there was no preference given to the heirs of the one above those of the other, (the criterion fixed on by lawyers for deciding cases of this kind; Stair, B. 2. Tit. 3. § 41. B. 2. Tit. 6. § 10. B. 3. Tit. 5. § 51. Bankt. V. 2. p. 327. Ersk. B. 3. Tit. 8. § 36.) both must come in equally.

Supposing the fee of the whole to have gone to the survivor, still a service was necessary to vest the feudal right in her. She could not in appearance gratuitously dispoise her sister's share, and cannot by implication be held to have passed from the right of challenge vested in her, and which is now competent to the pursuer; Ersk. B. 3. Tit. 8. § 99.

Answered: When a right is vested in two persons, and the longest liver of them, the survivor has not a liferent merely, but an absolute fee in the whole; 22d June 1627, Lidderdale, No. 99. p. 4247; Diet. voc. FRAG., January 1673, Archibalds against Ogilvy, No. 61. p. 4274. So much is this the case, that, though in general, where a subject is vested in a husband and wife, the

No. 2.

Two sisters who had purchased an heritable subject with their joint funds, and taken the rights to themselves and "the longest liver of them two, their heirs and assignees," concurred in disposing it *mortis causa* away from their heir-at-law. One of them was on death-bed. After the death of the other, who survived three years, without challenging the joint settlement, it was found not reducible *ex capite lecti*, as to the share of the predeceasing sister.

No. 2. former is sole fiar, if the expression "longest liver" occur, the wife becomes fiar by survivancy; 6th Nov. 1747, Riddels against Scott, No. 10. p. 4208; and the case is the stronger when the subject belongs to two strangers.

Independently of the expression "their heirs," therefore, an absolute fee was vested in Margaret merely by survivancy. She came, then, to have the same right which both had formerly; and as she did not succeed as Elizabeth's heir, a service was not necessary. If the superior had raised a declarator of non-entry, he would have been told, that the fee was full in the survivor.

The meaning of the expression "their heirs," varies according to circumstances. In a case like the present, it means the heirs of the longest liver; Ersk. B. 3. Tit. 8. § 35. 22d July 1739, Fergusson against Macgeorge, No. 9. p. 4202.

Supposing Margaret to have succeeded merely as her sister's heir, as her own share is effectually conveyed, it cannot be supposed that she did not wish Elizabeth's to go the same way; and having lived three years without challenging the disposition, her homologation in apparency excludes the plea of the pursuer; Ersk. B. 3. Tit. 8. § 99, 100. Bankt. B. 3. Tit. 4. § 42. 31st July 1666, Halyburton against Halyburton, No. 52. p. 5675.

On advising the petition, with answers, the case was considered to be attended with much nicety. The right of the sisters (it was observed) may be compared to that of trustees, or of a corporation, which transmits to the survivors without a new investiture. Each had an immediate fee in a half, and an eventual one in the whole.

The term "Their heirs," means heirs of the survivor.

Even if a service had been necessary, the right of challenge on death-bed is excluded by homologation in apparency.

The Lords, by a great majority, adhered to the interlocutor reclaimed against as to Margaret's share of the subjects in question; and likewise found, that, by her surviving Elizabeth, the fee of the whole subjects became vested in Margaret, and was carried to the defenders by the settlement; and "therefore assoilzied the defenders."

Lord Ordinary, Polkennet. Act. Ja. Gordon. Alt. D. Monypenny. Clerk, Gordon.

D. D. Fac. Coll. No. 144. p. 322.

1801. February 3.

Mrs. ELIZABETH CRAWFORD against THOMAS COUTTS.

No. 3.
How far a
disposition on
death-bed ex-

THE reported decision pronounced in this case, on the 17th November 1795, No. 53. p. 14958, having been appealed from, the House of Lords (11th July

1799) remitted the cause for further hearing to the Court of Session. The Lords adhered to the former judgment.

Act. *R. Craigie et alii.*

Alt. *Solicitor-General Blair et alii.*

R. D.

Fac. Coll. No. 216. p. 492.

On a second appeal, the House of Lords pronounced the judgment which is subjoined to No. 53. p. 14958, *voce* SUCCESSION.

No. 3.
cludes the heir-at-law, where the granter, while in *liege pousie*, has executed a former settlement in favour of a stranger, containing reserved powers to alter on death-bed.

1801. February 3.

STEPHEN MITCHELL *against* MARGARET WATSON.

HUGH MITCHELL executed a disposition of part of his heritable property in favour of Margaret Watson, on the 23d May 1799.

He died on the 22d July following.

Stephen Mitchell, his heir-at-law, averred, that at the date of the disposition, Hugh had contracted the disease of which he died, and never afterwards went to kirk or market. He further averred, that Hugh executed the deed about two o'clock afternoon of the 23d May, and that he died about one o'clock of the 22d July.

On these facts he instituted an action of reduction of the deed on the head of death-bed, and

Pleaded: It is settled by the case 10th December 1793, *Ogilvie against Mercer*, No. 114. p. 3836. that in ascertaining whether the granter of the deed has survived its execution for sixty days, the day of its date is not to be counted. Now, according to this mode of reckoning, Hugh Mitchell survived only fifty-nine days, and a part of the sixtieth; and as the heir is the *persona prædilecta*, the defender cannot take the advantage of the maxim, *Dies inceptus pro completo habetur*; for that maxim has place only in *favorabilibus*.

Besides, the operation of the maxim is precluded by the act 1694, C. 4. which expressly requires, that "the person live for the space of threescore days."

The Lord Ordinary "assoilzied the defender," and his Lordship added the following note to his judgment.

"The above interlocutor is founded on the admission, that the deceased died "at one o'clock afternoon on the sixtieth day after executing the deed under "reduction, not reckoning the day of its date, so that I apprehend there is of "course room for the rule, *Dies inceptus pro completo habetur*."

On advising a reclaiming petition against the Lord Ordinary's judgment, it was

Observed on the Bench: The interlocutor is fully supported by the principles of the judgment in the case of *Ogilvie against Mercer*, in the House of

No. 4.
In ascertaining whether the granter of a deed challenged on the head of death-bed, has lived sixty days, the day of its date is excluded, but the day of the granter's death is held to be completed, if he has survived any portion of it.

No. 4. Lords, of which an account is given in the Dictionary, No. 114, p. 3243, and DEATH-BED.

The Lords refused this petition; and a second on the 24th February.

Lord Ordinary, *Meadowbank*.

Act. *Maxwell Morison*.

Alt. *McCormick*.

R. D.

Fac. Coll. Nq. 217. p. 493.

. See Note under the case of Ogilvie against Mercer, p. 3343.

1805. December 6. CAMPBELL against RANKIN.

No. 5.

The exception of death-bed, not excluded by an anterior unfinished transaction.

HUGH LOGAN, of Logan, being desirous to make some recompence to George Rankin, of Whitehill, for his assistance in the management of his affairs, and being informed, that, in consequence of a destination in the titles of his estate, he could not convey any part of it by a gratuitous disposition, agreed to sell to Rankin, at a price considerably below their real value, the farms of Burnhead and Hylar, reserving possession during his own life. With this view, a minute of sale was executed in September 1801, by which these farms were conveyed to Rankin at the price of £2000; and the entry of the purchaser was to commence at the first term after Logan's death. By a clause in the minute it was provided, that it should be lodged in the hands of Kenneth Mackenzie, Writer to the Signet, till called up by the joint orders of the parties.

Mr. Mackenzie was afterward applied to for the purpose of making out a disposition; but, upon his declining to execute such a deed, and expressing his doubts that a sale of this sort might be reduced as *in fraudem* of the destination of the estate, a new transaction was entered into, by which a feu of these farms was granted to Rankin, and an annual feu-duty of £10. was stipulated in addition to the price formerly fixed. This feu-disposition, was granted on the 26th January 1802, at which time Logan was in an infirm state of health, labouring under a complication of disorders, which terminated in his death on the 12th of March following, without his having been either at kirk or market.

After Logan's death, Hugh Goodlet Campbell, his nephew and heir-at-law, raised an action of reduction of the feu-disposition of the 26th January, upon the head of death-bed; and Rankin raised an action against Campbell, as representing his uncle, to implement the minute of sale executed by Logan in September preceding.

These actions were conjoined, and a proof was allowed by the Lord Ordinary; which being reported to the Court, counsel were heard in presence, and memorials were afterward ordered. The heir-at-law

Pleaded: The object of Logan in granting this feu-right was evidently to make gratuitous alienation of his property, to the prejudice of the heir-at-law, who is entitled to reduce the disposition on the head of death-bed, as the grantor, at the time of executing it, was labouring under the disease of which he

died, without surviving the requisite period. The heir is not barred by the previous minute of sale from insisting in this reduction; because, in the *first* place, that transaction never was properly completed, it being provided, that the minute of sale could not be called up from the depository without the consent of both parties, so that either party, by withholding this consent, had a liberty of resiling; and the circumstance of the defender having afterward taken a feu-disposition of this property from Logan, shews that the sale was not understood to be completed; and, in the *second* place, the feu-disposition may be considered as a virtual revocation of the previous minute of sale, because the bargain in the minute of sale being more favourable to the defender, than the terms of the feu-disposition, his conduct in accepting it amounts to an implied discharge of the former; (See IMPLIED DISCHARGE, Sect. 5.) And as the feu-disposition takes no notice of the previous minute of sale, if it was a subsisting deed, it must be held as revoked by the feu-right, it being impossible that there could be both a sale and a feu of the same lands at the same time.

Answered: The feu-disposition challenged on the head of death-bed, was merely substituted in place of the minute of sale which had been previously executed. The heir-at-law has, however, no title to challenge this deed, because it is more favourable to his interest than the former; and even if this deed were to be reduced, the former one would revive, and be in full force. There is no doubt, that Logan was in *legitima potestate* when he executed the minute of sale; and as by this deed he became debtor to the defender, the subsequent deed was thereby in fulfilment of the former deed, which the heir cannot challenge. For, when the heir is excluded from the succession by an irrevocable deed in *legitima potestate*, he cannot complain of any subsequent deed executed on death-bed, which does not contain any addition to the property formerly conveyed; Ersk. B. 3. Tit. 8. § 97; Wilson against Irvine, May 17th, 1796, (not reported.) There can be no doubt that the minute of sale was a complete transaction, though deposited in the hands of a third party; for the presumption is with regard to any mutual contract that is put in the depository's hands for the security of both parties; Bankt. B. 1. Tit. 15. § 10; and a mutual contract does not require delivery to make it effectual; Ersk. B. 3. Tit. 2. § 44; Dict. *voce* Writ, Sec. 10.

The Lords (15th November 1805) "sustain the reasons of reduction of the minute of sale, and also of the feu-disposition founded on by the defender George Rankin; and in the action for implement, sustain the defences for Hugh Goodlet Campbell, and assoilzie him from the conclusions of that libel."

A reclaiming petition was afterward refused, without answers.

This cause was likewise argued on its special circumstances, as established by the proof; and it was contended by the defender, that there was not evidence that Logan was labouring under the disease of which he died, at

No. 5. the time when the feu-disposition was executed. Upon this point, it is unnecessary to notice the argument of the parties; but the Court were satisfied that the objection of death-bed was good in the circumstances of the case. Their difficulty lay entirely in the points of law above stated; but, upon the whole, they thought the minute of sale an unfinished transaction, and the feu-right in a great measure gratuitous.

Lord Ordinary, *Armadale*.

Act. *Blair, Monaghany*.

Agent, *K. Mackenzie, W. S.*

Adv. *Hay, Cathcart*.

Agent, *Jo. Hunter, W. S.*

Clerk, *Home*.

J.

Fac. Coll. No. 238. p. 517.

1808. June 3.

WILLIAM IRVINE *against* CRAWFORD TAIT, Esq. W. S. and Others.

No. 6.

A disposition having been executed on death-bed, and the heir having died in minority, reduction at the instance of the next heir was sustained.

ON the 11th June 1801, Andrew Irvine executed a trust-disposition, or settlement, conveying his whole property to William Irvine, his brother, Crawford Tait, Writer to the Signet, and certain other trustees, whom he likewise named tutors and curators to his son. The objects of trust were, after payment of his debts, 1st, "For the maintainance and education of David Irvine, my only son, until he shall arrive at the age of 21 years complete; whom failing, before the age of 21, and having lawful issue of his own body, for payment to, or division among them, such lawful children as he shall so leave, equally among them, share and share alike. 2^{dly}, I hereby appoint my said trustees, so soon as my said son shall attain the age of 21 years, to denude themselves of this trust, and to convey my whole heritable and moveable subjects in favour of my said son, and pay over what balance shall remain in their hands, upon a legal and sufficient discharge of their hail intromissions and management. But in case my said son shall die before attaining the age of 21 years complete, without leaving lawful issue of his own body, then, and in that case, I hereby appoint my trustees to convert my whole heritable and moveable estate into money, and to make payment of the following legacies to the persons under-written, to whom I leave and bequeath the same, and that as soon as possible after the death of my said son as aforesaid," viz. A variety of legacies are then enumerated, of which several were granted to the trustees and their families.

At the time of executing this deed, Andrew Irvine was in bad health; and he died on the 25th June 1801, fourteen days after it was subscribed, without having been either at kirk or market.

Messrs. Irvine and Tait, and the other trustees, accepted of the trust; and proceeded in the arrangement of the affairs, by selling certain subjects, and by finishing buildings which had been begun by the truster. William Irvine was active in the management; and received a pecuniary remuneration for his trouble.

William Irvine, the trustee, died on the 27th August 1804; and David Irvine, the son of Andrew, having entered into the navy, died in the month of August 1805, in minority.

William Irvine, the eldest son of the deceased William, who now became heir-at-law of Andrew, then raised a process of reduction, on the head of death-bed, for setting aside the trust-deed executed by his uncle Andrew, and under which his father had acted. The trustees raised a process of multiplepoinding and exoneration; and these conjoined actions having been advised by Lord Meadowbank, Ordinary, the following interlocutor was pronounced, (May 12. 1807): " Finds, that the possession of David Irvine, under his father's settlement, being that of a pupil or minor, did not bar the challenge, of the person who might be heir-at-law to him at his death, of that settlement: Finds, that the actings of William Irvine as a trustee under that settlement, while the succession had not opened to himself, do not bar the same challenge, and that even though the person who brings it happened to represent him, (which, however, is not alleged in the present case to be the fact,) therefore repels the defences; and in the reduction, reduces, decerns, and declares in terms of the libel."

The cause came before the Inner-House by petition and answers.

The argument for the trustees.

1st, The deed having been accepted by David, the immediate heir, and his tutors and curators, all challenge at the instance of a remoter heir is precluded.

The origin of this branch of law is lost in obscurity; but from the earliest accounts it conferred on the heir, *alioqui successurus*, a right to reduce any deeds affecting heritage executed by his predecessor on death-bed, and to his prejudice. This right, however, might be renounced, either by consenting to the deed at the time of its execution, or by ratification after the granter's death.

At one time it was even doubted whether, where the immediate heir had died without either approbating or reprobating the deed, challenge was competent to the remoter heir. But such right was at last acknowledged, 21st January 1668, Schaw, No. 15. p. 3196; 16th July 1672, Gray, No. 16. p. 3196.

It was then agitated whether the ground of challenge, competent to the remoter heir, arose from the injury done to himself, or whether he must plead in right of the immediate heir, against whom it was necessary to shew that lesion had been committed; and the Court at one time sanctioned the principle that " the exception of death-bed was competent to remoter heirs, though the deed was not in prejudice of the immediate heir apparent." Kennedy against Arbuthnot, 13th July 1722, No. 17. p. 3198.

But by a series of decisions, the Court have departed from this principle, and required that lesion to the immediate heir shall be established to found a

No. 6. reduction at the instance of a remoter heir, 18th February 1739, Craigs, No. 18. p. 3199 ; November 1738, Irving, No. 4. p. 3180.

In the present instance, David the immediate heir, so far from being injured, derived material benefit from the deed challenged. It left him the entire disposal of the property, as soon as the law authorised him to exercise such power,—it saved him from the expense of a judicial nomination of tutors and curators; and enabled the trustees to take those measures for the beneficial arrangement of his property, which could not otherwise have been without considerable expense.

The deed being thus beneficial to the pupil, the trustees were entitled in his name to homologate, and act under it. Such ratification being a beneficial act of administration, is as binding in law as if it had been done by a person of full age. Such a proceeding does not amount to a settlement or alienation of heritage, to which a minor is incompetent, but is an useful act of administration which must validly infer its legal consequences. The trustees were bound to adopt the alternative of repudiation or ratification, and at the same time to consult most effectually the interest of the pupil.

It is impossible, therefore, to establish that lesion has been committed against the pupil, the immediate heir, by the deed challenged; and the ratification of the deed, and possession under it, now preclude challenge. For it has been determined, by the most recent decisions on the subject, “That the institutes in the disposition quarrelled, who were nearest heirs at the time, having attained possession, the same is not reducible at the instance of a remoter heir,” 18th November 1740, Hedderwick, No. 5. p. 3180.

2d, William the trustee, the father of the pursuer, and the uncle of the minor, homologated the trust-deed. This William, next to the minor, was *alioqui successurus*; and his acceptance, joined to that of the minor, must remove all ground of challenge. If William, the uncle, had survived the minor, challenge would have been incompetent to him, for he could not have approbated the deed, so far as the nephew was concerned, and reprobated it so far as it contained the substitution. The one provision was as illegal as the other; and both must have fallen or none. To have sustained reduction at his instance would have been to reduce all those dispositions and sales of the heritable property which himself had authorised and subscribed. It is no answer to say, that he had no interest, in respect the succession had not opened to him. His situation is the same as that of a remoter heir of entail, who may challenge contravention; and there exists for this right the same necessity. To wait till the succession devolved, would be to allow the period to elapse during which alone the necessary facts could be proved; viz. that the granter, at the date of the deed, laboured under the disease of which he died, and did not walk unsupported to kirk and market.

Argument for pursuers.

That the minor could not himself homologate the settlement challenged, is indisputable, because “a pupil has no person in the legal sense of the word;

“ he is incapable of acting or even of consenting.” Erskine, Lib. 1. Tit. 7. § 14. No. 6.

Farther, the possession of the trustees cannot, in law, be held to be that of the minor, because they had a distinct personal interest to support the deed, in as much as, considerable legacies were eventually to arise to them under it. Besides they did not take those measures, by making up tutorial and curatorial inventories, to invest themselves with the character of tutors and curators, which alone could identify them with their pupil, and render their actings his. They acted merely as trustees, in which character they had an interest distinct from that of their pupil. But it was *ultra vires* of the trustees to homologate the settlement, for such a proceeding amounts to alienation of heritage. Accordingly, if an heir ratify a death-bed deed, his creditors are entitled to set it aside under the act 1621, on the principle, that ratification is equivalent to a conveyance. Bank. Lib. 3. Tit. 4. § 44.

Such being in law the nature and amount of ratification, it was incompetent to the trustees, because they cannot authorise the alienation of a minor's heritage. Erskine, Lib. 1. Tit. 7. § 93. 8th March 1797, Cunningham, No. 80. p. 8966.

Even the possession of a wife along with her husband, does not infer homologation or consent on her part in such a case; 16th July 1672, Gray, No. 16. p. 3196.

So likewise in the case of a minor or infant. DEATH-BED, Sect. 13. Bank. Lib. 3. Tit. 4. § 45.

In contemplation of law, the minor suffered lesion by the deed challenged; 1st, From the substitution of stranger heirs, in case he died in minority and without issue; and, 2d, From the distribution of the property among his children, in case of his dying in minority and leaving issue. In one event, his lawful heirs were altogether excluded; and, in the other, their interest was injured by a division of the estate different from that which the law would have declared. Accordingly, such lesion has been recognized in law. DEATH-BED, Sect. 2.

Sir George Mackenzie (Treatise on Tailzies) likewise doubts whether a minor can, with consent of his curators, make a tailzie, “ in respect that a minor may “ be justly said to be lesed, in that he wrongs his family and nearest relations.”

That lesion against the immediate heir is not required to entitle the remoter to reduce, and that the latter pursues on the injury done to himself, may be considered to be determined. Erskine, B. 3. Tit. 8. § 99. Bank. B. 4. Tit. 4. § 34.

And there are several decisions in support of this opinion. DEATH-BED, Sect. 3. 13th July 1722, Kennedy, No. 17. p. 3198.

In the last place, nothing has been done by William Irvine to preclude the pursuer. He acted as trustee under the settlement, and not *privato nomine*; and, therefore, that which is essential to homologation is wanting, viz. intention and consent.

No. 6.

But into his intention it is unnecessary to inquire, because, till the death of the immediate heir, any challenge at his instance was incompetent; and there is not to be found an instance in which such a challenge has either been made or sustained. Till the death of the immediate heir, he has no interest; he has only a precarious and defeasible right, a *spes successionis*, on which he was not entitled to pursue. An heir of entail is in a different situation; and has a *jus crediti* in the estate, which entitles him to challenge every act which interferes with his right. The pursuer, however, does not in any shape represent William the trustee.

The Court agreed in opinion with the Lord Ordinary. It was observed, that homologation cannot be inferred against a minor, even where acting with consent of his tutors and curators; and in the present case, the introduction of strangers into the succession was lesion, of which the heir was entitled to complain; neither did the acceptance of the trust, and the proceedings under it by William the trustee, preclude him. Homologation implies a right to challenge; and till the death of the immediate heir, the remoter was not entitled to pursue.

The Court adhered to the interlocutor of the Lord Ordinary; and upon advising another petition and answers, adhered, (3d June 1808.)

Lord Ordinary, *Meadowbank.*

Act. *Tho. W. Baird.*

Alt. *Alex. Irvine.*

Ja Greig, W. S. and Will. Callender, Agents.

S. Clerk.

J. W.

Fac. Coll. No. 48. p. 178.

DEBTOR AND CREDITOR.

SECT. I.

Relief among Co-debtors, and whether the Creditor, upon payment, is bound to assign in order to operate relief.

1635. June 26. GREIVE against HEPBURN.

ALLEXANDER GREIVE, as heir to his father umquhile George Grieve, who had bought a dwelling-house in Edinburgh from Mr Alexander Hepburn, with ample warrandice; and the whole tenement, whereof this dwelling-house was a part, being affected with a ground annual of 100 merks yearly, redeemable to the author of the annualrent, by payment of 1000 merks before the alienation made to George Grieve; the said Mr Alexander's dwelling-house being distrest for the whole annualrent by Lawrence Scot, advocate, who was heritor of another part of the tenement affected with the said burden, and which Lawrence had acquired the right of the said annualrent from the heritor thereof, whereby he laid the burden of the whole annualrent, and the total payment thereof, upon the pursuer's dwelling-house, and made his own part free; the said pursuer pursues the said Mr Alexander Hepburn, his author, for warrandice from that annualrent, and for that effect to be decerned to pay all the bygones of the years paid by him, and also to hear and see the said annualrent, for time to come, to be liquidate to a certain particular sum, for which he might have execution by poinding, or comprising of the defender's goods, or lands, when he should find occasion to deprehend the same thereafter, according to such a quantity as the Lords should extend the said annualrent to for times subsequent; which summons being called, and no party compearing, the Lords having considered the same, and the desire thereof, they sustained the same, and the conclusion thereof, (albeit it was not usual to decern the like, viz. to liquidate a distress which might ensue *in futuro*, to a particular principal sum, before the party should be decerned and distressed *pro tanto*, seeing it was *futurum quod potuit contingere vel non*, but in regard the cause was seen and perpetual, viz. a distress yearly of 100 merks, ay and while it were redeemed by payment of

No 1.

Although an annualrenter may distress any part of a tenement affected, for the whole annualrent, yet the Lords found, that the heritor of that part might seek his relief from the rest of the lands affected, and from the heritors thereof *pro rata*, and this both for bygones already paid, and for time to come.

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1000 merks;—THE LORDS therefore liquidated the distress to 1000 merks, for which they found the pursuer might seek execution against the defender; and which sum, if he recovered, the LORDS found, that the said pursuer should make equally and alike profitable to the whole rest of the heritors of the land affected, to the effect that the whole tenement thereby might be relieved of the said burden, and that the annualrenter might receive payment of the principal sum thereby: And the LORDS found, that albeit the annualrenter might distress any part of the tenement affected for the whole annualrent; yet that the heritor of that part which should happen to be distressed, or which was distressed some time by-past, might well and lawfully seek his own relief off the rest of the land and tenement affected with the burden, and off the heritors of the same *pro rata*, and for their own parts proportionally, according to the worth and rent of their lands, to be equally divided amongst the saids whole heritors; and that every one of them ought to bear his own part of the burden, both for bygones already paid, and also for all years to come, while the principal sum might be recovered for all their reliefs.

Act. *Nicolson & Heriot.*Alt. *Absent.*Clerk, *Gibson.**Fol. Dic. v. I. p. 221. Durie, p. 769.*

No 2.

1662. June 19. Mr JOHN WALLACE against FORBES.

Where persons are bound conjunctly and severally, they are entitled to relief against one another.

ROBERT and WILLIAM FORBES', and Hugh Wallace, being bound in a bond as co-principals, Hugh Wallace being distressed for all, consigned the sum to this charger's son. Forbes suspends, on this reason, that there is no clause of relief in the bond, and Wallace being debtor *in solidum*, and having gotten assignation. *confusione tollitur obligatio*. The charger answered, That though there was no clause of relief, *hoc inest*, where many parties are bound conjunctly and severally, that each is obliged to relieve others.

THE LORDS repelled the reason of suspension for the suspender's part, and found them liable therefor, but not for the other co-principal parties.

Fol. Dic. v. I. p. 221. Stair, v. I. p. III.

*** The like was decided in the cases of Monteith against Anderson, *voce* BANKRUPT, No 133. p. 1044.; and Ferguson against More, *voce* COMPENSATION.—RETENTION, No 119. p. 2652.

No 3.

1662. June 26. ADAMSONS against LORD BALMERINO.

An annualrent being payable out of two tenements.

ADAMSONS being infeft in an old annualrent out of two tenements in Leith, and having thereupon obtained decret of poinding the ground in *anno* 1661,

and insisting for pointing one of the tenant's goods, now belonging to the Lord Balmerino, for the whole annualrent, Balmerino suspends, on these reasons, *1mo*, The heritor, against whom the decret of pointing was obtained, and all his tenants, were dead; and therefore it can receive no summar execution against the present heritor and his tenants, but there must be a new decret against them. *2do*, Balmerino hath peaceably possessed this tenement 20 or 30 years, and thereby hath the benefit of a possessory judgment, by which his infetment cannot be questioned without reduction and declarator. *3tio*, The English possessed this tenement several years by the public calamity of war; and therefore there must be deduction of these years annualrents, as is frequently done in feu-duties. *4to*, The two tenements being now in the hands of different singular successors, Balmerino's tenement can only be pointed for a part of the annualrent. The pursuer *answered*, That pointing of the ground is *actio realis*, chiefly against the ground; and therefore, during the obtainer's life, it is valued, not only against the ground, while it belonged to these heritors and possessors, but against the same in whosoever hands it be, that the moveable goods therein, or the ground right thereof, may be apprised. To the *2d*, Annualrents are *debita fundi*, and a possessory judgment takes neither place for them, nor against them. To the *3d*, Though, in some cases, feu-duties cease by devastation, that was never extended to annualrents, due for the profit of a stock of money. To the *4th*, The annualrent being out of two tenements promiscuously, the annualrenter may distress any part for the whole, in whosoever hands the tenement may be.

THE LORDS repelled all these defences, but superseded execution for one-half of the annualrent for a time; and ordained the suspender to give commission to Balmerino to put the decret in execution against the other tenements for its proportion, for his relief, *medio tempore*.

Fol. Dic. v. 1. p. 221. Stair, v. 1. p. 114.

1666. July 10. Dame MARGARET HOME against DAVID CRAWFORD.

UMQUHILE John Earl of Loudon as principal, David Crawford of Kers, with eight others, as cautioners for him, being debtors to Dame Margaret Home, Lady Loudon, for payment making to her of the sum of 2700 merks yearly, during her lifetime, at the terms mentioned in the contract, passed amongst the parties, all the cautioners and principal being dead, except David Crawford, and he being charged, and having suspended, he only craved, that, in regard the contract bears no mutual clause of relief, and that he is the only person charged, the LORDS would be pleased, upon payment of the money by him, to ordain the charger to assign the foresaid contract to the suspender, that he may obtain his relief. And it being controverted, whether the charger was obliged

No 3.

ments, which came afterwards into the hands of two different singular successors, it was found, that the annual-renter might uplift the whole out of any one of the tenements, assigning against the other for relief.

No 4.

A cautioner, upon payment, craved assignation against his co-cautioner. The Lords found the creditor not obliged to assign, the cautioner being sufficiently secured in law by his action of relief.

No 4.

in law to assign the suspender to the contract, that he might get his relief from the remanent cautioners;—THE LORDS found, that the charger was not obliged to assign against the rest of the cautioners; but that the suspender having paid, the law would supply the defect of the clause of the relief, which grants action to the cautioners for pursuing the remanent cautioners, according to the civil law;—in Novell. 4. c. 2.

Fol. Dic. v. 1. p. 221. Newbyth, MS. p. 71.

* * This case is also reported by Stair, *voce* CAUTIONER, No 38. p. 2112.

1668. *January 24.*

MAGISTRATES of DUNDEE against The EARL of FINDLATER.

No 5.

A Magistrate, upon his negligence in suffering a debtor to escape from prison, being condemned to pay the debt, has no recourse against the cautioners, whether he obtain from the creditor a discharge only, or be assigned to the debt; because he is liable *ex delicto* and comes in place of the principal debtor.

THERE was a bond granted by one Jackson principal, and a cautioner, which is also alleged to have been subscribed by umquhile Inchmartin as another cautioner; which bond being registrate at the creditor's instance, he did thereupon incarcerate the principal debtor, whom the Magistrates having suffered unwarrantably to escape, the creditor obtained decret against the Magistrates for payment of the debt. The Magistrate pays the debt, but takes assignation from the creditor; and now, as assignee, pursues the Earl of Findlater, as representing Inchmartin, one of the cautioners, for payment, who *alleged* absolutor, *imo*, Because the bond is null as to Inchmartin, wanting both date and witnesses; for it bears to have been subscribed by the principal, and the other cautioner, at such a place, such a day, before these witnesses, who are subjoined, and designed, and after the names of these witnesses says, 'and subscribed by Inchmartin at ———;' after which there nothing follows in the bond but the subscription of parties, none of which subscribe as witness to Inchmartin, yet his subscription is amongst the subscriptions of the other parties, but as to him, it hath neither place, day, nor witnesses. The pursuer offered to condescend, that the day and place of the subscription of the witnesses were the same to Inchmartin as to the principal and other cautioner, which they alleged to be sufficient to make up this nullity, as is ordinary where the writer and witnesses are not designed, for thereupon the defender may improve the bond by the witnesses insert. The defender *answered*, That albeit the Lords supply the want of designation of writer or witnesses, by condescending on their designation, that means of improbation may be afforded, which is not the question here; yet the Lords did never suffer parties to fill up witnesses, where no witnesses were insert, nor no date, either as to year or month.

THE LORDS would not sustain the bond upon this condescendence, but *ex officio* ordained the witnesses (if they were alive) to be examined, whether they

were witnesses to Inchmartin's subscription that same day and place with the rest, reserving to themselves what their testimonies should operate. *See* WITNESS.

The defender further *alleged* absolvitor, because he offers him to prove, that there was a decret against the Magistrates now pursuing, at the instance of the creditor, for payment of the debt, because they suffered the principal creditor incarcerate to escape, so that the debt being paid by the Magistrates, coming in the place of the principal debtor *ex delicto*, it is in the same case as if the principal debtor himself had paid, which necessarily liberates his cautioners. It was *answered*, That the Magistrates are only liable to the user of the diligence *pro damno et interesse*, and to no other; for the creditor (user of the diligence) might have consented to the escape of the rebel, or might have discharged the subsidiary obligation, or action competent against the Magistrates for suffering him to escape, whether the cautioners would or not, and therefore the Magistrates might as well take an assignation from the creditor for payment of the debt, which implies the creditor's passing from them as bound *ex delicto*; in which case he would only have given them a discharge; but here the Magistrates contract with the creditor, and acquire the assignation, *ut quilibet* upon an equivalent cause. It was *answered* for the defender, That this assignation is evidently simulate in place of a discharge, there having preceded a decret against the Magistrates, *ita est*, that assignations granted to persons obliged for a debt, do operate always as to the matter only as a discharge, though more summarily; as when cautioners pay, and are assigned, they must allow their own part; but much more these who are liable *ex delicto*, having paid upon a decret, cannot seek relief, whether they have assignation or discharge, especially against cautioners; and if this were sustained, all rebels who had cautioners might be suffered to escape, where there are any cautioners, for messengers might be deforced, taking assignation to the debt, and proceeding against the cautioners, and albeit the user of the diligence might consent to the liberation, yet he could not pass from the obligation *ex delicto*, which accresceth to all parties having interest; and if the cautioners had been distrest by the creditor, they might pursue the Magistrates, suffering the principal to escape *ex delicto et damno*, for if he had not been suffered to escape, they would have been paid.

THE LORDS found this defence relevant, that the Magistrates pursuers, having suffered the rebel to escape, and decret against them, and having satisfied the debt to the creditor, that they could not have recourse against the cautioners, either by virtue of a discharge or assignation. Here it was not debated, whether or not they might have recourse against the principal debtor escaping, who was *principaliter in delicto*, and the Magistrates but accessory.

Fol. Dic. v. 1. p. 222. Stair, v. 1. p. 513.

* * Dirleton reports the same case :

No 5.

A CREDITOR having obtained a decret *in subsidium*, for payment of his debts, against the Magistrates of Dundee ; and having assigned the bond whereupon the debt was due, to the Magistrates, they pursued the cautioners in the bond ; who *alleged*, that the debt and bond being satisfied by the principal or Town of Dundee, who was liable *loco rei ex delicto*, the cautioners were liberate.

THE LORDS did demur and delay to give answer.

1668. *January 24.*—THE TOWN of Dundee being pursued *in subsidium* for payment of a debt due by a rebel, whom they suffered to escape out of prison ; after decret satisfied the creditor, and took assignation to the debt and bond, whereupon they pursued the Earl of Findlater one of the cautioners. It was *alleged*, That the town *ex delicto* had come in the place of the principal debtor, and payment made by them did liberate the cautioners, as if payment had been made by the principal. It was *replied*, That the Town was only liable to the creditor, who might pass from his decret against the Town ; and as he might have assigned the debt to any other person, the Town as *quilibet* might have a right from him.

THE LORDS found, that the Town is not in the case of cautioners, or *expromissores ex pacto*, but of *correi*, being liable in law *ex delicto* for, and in place of the principal.

Dirleton, Nos 91. & 147. p. 37. & 59.

1671. *June 22.* LORD BALMERINO *against* HAMILTON of Little Preston.

No 6.

Found in conformity with
No 1. p. 3345.

WISHART in Leith did grant infeftment of an annualrent of L. 40 yearly, out of two tenements in Leith, in any part of them ; which annualrent by progress belonged to Mr John Adamson, and after the constitution of the annualrent, the two tenements were transmitted to different proprietors, and now the one belongs to the Lord Balmerino, and the other to Hamilton of Little Preston ; the annualrenter did only insist against Balmerino's tenement, and upon an old decret of poinding of the ground of that tenement, hath continued in possession, and distressed Balmerino ; who having suspended on this ground, that the annualrent being out of two tenements, whereof he had but the one, he could be only liable but for the one half.

THE LORDS found that the annualrenter might distress any of the tenements for the whole, but reserved to Balmerino his relief as accords.

Whereupon Balmerino now pursues Little Preston to repay him the half of the annualrent, for which he was distressed, because he having paid, did libe-

rate Little Preston of the annualrent which affected both tenements, they being now in different heritors' hands, behoved to infer a proportional relief, as is ordinary in all annualrents, constitute upon any barony or tenement which thereafter comes to be divided. The defender *alleged* absolvitor, because he had bruiked his tenement much more than 40 years before this pursuit, free of any such annualrent; and therefore had prescribed the freedom thereof. The pursuer *answered*, that prescription was hindered by the annualrenter's possession, in getting his annualrent, which though it had been but by a personal obligation, it would have preserved his right entire to all effects in the same manner; as payment by a principal debtor hinders the cautioner's bond to prescribe; though he were free thereof for 40 years. It was *answered*, that albeit there might be ground for the reply, where the annualrent is constitute out of one barony or tenement, whereon infeftment may reach the whole, yet it cannot hold in this case, where the annualrent is constitute upon two distinct tenements; and where there behoved sasine to be taken upon both of them, and if omitted upon one, that would be free.

THE LORDS found that payment of the annualrent out of any of the tenements, saved prescription as to both. See PRESCRIPTION.

Fol. Dic. v. 1. p. 221. Stair, v. 1. p. 738.

1675. January 27.

MONTEITH against RODGER.

MONTEITH and John Rodger being conjunct cautioners, there is a pursuit against Monteith, at the instance of an assignee to the bond, for payment of the debt; in which pursuit it was *alleged*, that the samin being to the behoof of John Rodger, who was conjunct cautioner, Monteith the other conjunct cautioner, could only be liable for a half, because if Rodger himself were pursuing for the whole, Monteith might relevantly allege, that his co-cautioner could not distress him for the whole, but behoved to allow his own half. It was *answered*, That in this bond there is no clause of relief amongst the co-cautioners; so that one of them getting assignation from the creditor, as being in the creditor's place, may distress the other for the whole. It was *replied*, that *correi debendi* are liable for mutual relief, though there be no express clause of relief, which though it uses to be adhibit, *ad majorem evidentiam*, yet it is implied *ex natura rei*, in respect that both parties being liable *in solidum* to the debtor, any one paying, doth not only liberate himself, but all the rest, which being *utiliter gestum*, obliges all for relief of their shares, as hath been decided by the Lords oft times in the case of co-principals; and the reason is the same amongst co-cautioners, and was so decided amongst co-cautioners, January 14. 1673, Scot *contra* Douglas, (See APPENDIX.) It was *duplied*, That co-principals have a ground of mutual relief, because as to the one half they are co-principals, but as to the other half they are mutually cautioners, and so they do engage upon:

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No 7.

Found in conformity with
No 2. p. 3346.

No 7.

the mutual desire or mandate each of other, *et tenetur ex mandato*, but co-cautioners do not engage upon the desire of either of them, but upon the desire of the principal debtor; and therefore *inter se nullum habent negotium*; upon which account by the civil law they have no relief, *nisi ex pacto*. It was *triplied*, that by the Roman law *correi debendi* had *exceptionis, divisionis, ordinis et actionum sedendarum*; by which they were not obliged to pay the creditor till he assigned his right, which doth not quadrate with our customs, whereby co-principals have oft times been found liable without an express clause of relief, and without assignation from the creditor; and there is the same reason amongst co-cautioners, when one by his act relieves all.

THE LORDS found that the co-cautioners were liable for mutual relief, without an express clause of relief.

Fol. Dic. v. 1. p. 221. Stair, v. 2. p. 312.

* * * Dirleton reports the same case:

1675. *January 5.*

It was debated this day among the Lords, whether a bond being granted by a principal and two cautioners bound conjunctly and severally; and the cautioners not bound to relieve one another; if one of the cautioners should take assignation to the bond and should pursue the other, the said other cautioner will have a defence upon that ground, That albeit they be not obliged to relieve one another *pro rata*, yet that the said obligation *inest*, in so far as they are bound conjunctly and severally; most of the Lords inclined to find, that the pursuer ought to relieve the co-cautioner *pro rata* and had not action but for his own part. But some of the Lords were of another opinion, that there being no obligation upon any of the co-cautioners to relieve one another; one of the cautioners paying entirely and getting an assignation, in effect *emit nomen*: And though both the cautioners be obliged conjunctly and severally in relation to the creditor, yet there is no transaction or obligation betwixt the cautioners themselves; every one having *actio mandati* as to the principal for their relief, which *inest*, though the principal were not bound to relieve them expressly; but ought to be considered as *quilibet*, and strangers to one another.

But because the Lords were divided, and it was alleged on either hand, the case was formerly decided; the decision was delayed this day.

January 27. 1675.—IN the case above mentioned, 5th January instant, concerning con-cautioners obliged conjunctly and severally for the principal, without a clause of mutual relief; THE LORDS found, That one of the cautioners having paid and taken assignation, the others had a good defence against him for his own part, notwithstanding of the reasons there above mentioned; and that it was urged, that the co-cautioner could not be forced to relieve the defender if he had paid the whole; seeing he had neither *actio mandati*, there

being none given by either of the cautioners to others; nor was obliged to relieve the other cautioners by an express clause, which is ever insert, when mutual relief is intended; and that this is clear law, it appears from the title of the civil law *de Fidejussoribus ff. lib. 46. tit. 1. leg. 39. Et leg. 36. ibid. Et leg. 11. cod. eod. tit.*

THE LORDS decided, as said is, in respect of a practique produced betwixt
in anno relating to a
former practique in anno

Dirleton, No 212. 228. p. 90. 108.

No 7.

1676. November 7.

THOMAS RIG against the CAUTIONERS for the LAIRD OF BROOMHALL.

THERE being a suspension raised by the Laird of Broomhall of a charge upon a bond for borrowed money, against Mr Thomas Rig, who was assigned by Alexander Lockhart to the principal bond whereupon the suspension was raised, and Captain Crawford found cautioner in the suspension; which Cautioner being charged, he gave in a bill of suspension, upon the reason, That he being Cautioner, and being willing to pay the debt, he craved, that he might have an assignation for his relief, not only of the principal, but of the whole Cautioners contained in the principal bond; whereupon they being ordained to be heard before the Ordinary upon the bills, and he to make report;—it was *alleged* for the Cautioners, That no assignation would be granted against them to the Cautioner in a suspension, but only to militate against the principal for whom he was cautioner. It was *answered*, That albeit the principal, Broomhall, was only charged, yet it was not only suspended to his benefit, but to the benefit of the whole Cautioners, who were bound to the creditor; and that by payment he did free both principal and Cautioners, and therefore ought to be assigned to the whole obligements. THE LORDS did consider this as a general case, and found that the creditor, or his assignee, if they had discharged any of the Cautioners, they could not be of new distrest, and so were not obliged to assign the cautioner in the suspension, or the principal debtor, who were only charged; and so ordained that the creditor and his assignee should give their oath, if, by writ or promise, they were bound to any of the Cautioners in the bond, never to distress them; in which case, any of the Cautioners to whom they were bound were to be free, and no assignation to be granted against them; otherwise they found that the assignee should be obliged to assign the cautioner in the suspension, who was to make payment of the bond, that for his relief he might not only discuss the principal, but all those Cautioners, who were not secured by a discharge or promise not to be distrest.

No 8.

A cautioner in a suspension being distressed upon a decree, may crave an assignation; not only against the principal, for whom he was cautioner, but against the whole cautioners in the original bond.

Fol. Dic. v. 1. p. 221. Gosford, MS. No 898. p. 577.

1677. July 5.

JANET M'MILLAN and THOMAS DUNLOP *against* JOHN SMELLIE.

No 9.

Found in
conformity
with No 2.
p. 3346.

JOHN SMELLIE being charged upon a bond, for payment of 100 merks to the said Janet, and Robert Dunlop her husband, for his interest, did suspend upon these reasons; *1mo*, That the bond was made to James Wilson her son, and failing of him and his heirs, to the said Janet and her heirs; and the said James being yet on life, and now major and fiar, the mother being only substitute, can never crave payment; *2do*, The suspender being only one of three cautioners for James Schaw, who was principal debtor, of which three Thomas Dunlop, the said Janet's husband, was one, the charge ought to be suspended for the half of the debt for which he was con-cautioner with the suspender. It was *answered* to the *first*, That the bond was opposed, bearing to be paid to the said Janet, at any time she should require ever during her son's life time, likeas, she was willing to re-employ in the same terms. It was *answered* to the *second*, That there being no obligation of relief in the bond, it was in the option of the creditor to charge any he pleased; and upon distress they can never seek relief, having subscribed cautioner without any such obligation. THE LORDS did repel the first reason, in respect of the conception of the bond, notwithstanding that the money was lent when the son was minor; and now the reason raised by his majority, which might give her power to uplift; but ordained caution to be found for re-employment for the son, as the first fiar, and failing of him and his heirs, to the mother; only they did likewise repel the second reason, and found that all co-cautioners were bound to relieve others without any special obligation for that effect, and that any one of them being distress for the whole, may seek his relief, as being founded in *jure communi*, as if they were conjunct debtors, seeing the law presumes, that every one of them did only engage to be cautioners *intuitu* of those that were conjunct with them.

Fol. Dic. v. 1. p. 221. Gosford, Nos 990. & 991. p. 667.

No 10.

Two persons
being found
liable, *in solidum*, to pay a
fine, the
Lords decerned the creditor, upon
payment
by one, to
assign against
the other for
the one half,
because without
such assignation the
law does not

1680. July 15. ANDERSON of Dowhill *against* BLACKWALL and STIRLING.

THE criminal Lords in July 1673, in the case betwixt the Magistrates of Aberdeen and Francis Irvine of Hilton, found malefactors that were not *effractores carcerum*, but came out in women's clothes, were only liable for an arbitrary punishment at most. THE LORDS found them both liable *in solidum* to pay the said fine of 10,000 merks, and decerned each of them to be assigned to the half, that so they might relieve one another proportionally, because without

this assignation, the law will furnish no relief where they are liable *ex delicto* per l. 46. D. *de regulis juris*.

Fol. Dic. v. 1. p. 122. Fountainball, MS.

No 10.
furnish relief
betwixt the
correi, who
are liable *ex
delicto*.

1695. December 12.

WOOD against GORDON.

MERSINGTON reported Major Wood and the Laird of Spot against Mr William Gordon, advocate ; who being pursued for 1000 merks, propones compensation, that you Major Wood, by your bond of relief, was bound to free Mungo Wood, your uncle, and my father-in-law of an equivalent debt, and which Mungo being forced to pay, assigned to the said Mr William. *Objected, Imo*, That he produced no assignation to the debt, but only a simple discharge, which could only extinguish the debt, but never produce an action or ground of compensation. *Answered*, Some creditors are so scrupulous, they will not grant an assignation, and to which they cannot be forced by law ; but a discharge to a cautioner operates the same effect *quoad* his relief, that an assignation would do, except as to a summary charge and present execution. THE LORDS repelled the objection in respect of the answer. The 2d defence was, that posterior to the bond of relief, he had obtained a general discharge from Mungo Wood, on the back of a bond for L. 340 Scots, not only discharging that particular sum, but also all preceding demands, which must necessarily comprehend this debt ; and that the Lords, in the case of Forbes against Gordon, *voce* GENERAL DISCHARGE, &c. had sustained such a general discharge to cut off all precedings. *Answered*, That these words, ' of all preceding demands,' could never extend to comprehend a bond of relief for a sum much greater than the particular sum discharged, especially seeing it was not after a stated count and reckoning (as that of Gordon's was,) and that it appeared there was a current trade and correspondence between the Major and his uncle, which might be the meaning why these words ' of prior demands,' were insert ; and in the case of Law and Baird, 16th and 22d November 1695, *voce* POSSESSORY JUDGMENT, the Lords would not allow a renunciation, though in most comprehensive terms, to go beyond the comprising therein narrated ; 14th February 1633, Haliburton against Hunter, *voce* GENERAL DISCHARGE and RENUNCIATION ; and 24th February 1636, Lawson against Ardkinlass, *IBIDEM*. THE LORDS repelled also the second defence, and found this general clause could not extend to a bond of relief, unless he could prove it was *deductum in computo*, and expressly treated and communioned on at the time. As to the first point, the Romans allowed their cautioners, besides the *exceptio ordinis et discussionis*, likewise *beneficium actionum cedendarum* ; as to which our practice is not yet arrived at a full consistency.

No 11.
A discharge
to a cautioner
operates the
same effect,
quoad his relief,
that an
assignation
would do, except
as to a
summary
charge and
present execution.

Fol. Dic. v. 1. p. 221. Fountainball, v. 1. p. 687.

No 12.

Found in
conformity
with No 4.
P. 3347.

1697. December 31. WAIT and RAE against PANTON.

WAIT's children, and Bailie Rae in the Canongate, who was lately their tutor, charge William Panton writer, for 1000 merks contained in his bond. He suspends, that the bairns not having chosen their curators, there was none authorised to give him a valid discharge.—*Answered, 1mo*, The money is payable to me for their behoof, and though my office of tutory be expired, yet I will give you sufficient warrandice; likewise, the Lords may name their advocate to be curator *ad hanc litem*; *2do*, A minor wanting curators may do all that a minor having curators can do.—*Replied, Plenissima securitas* to the debtors of minors is, either where they pay to curators, or on the sentence of a judge; and here a curator *ad lites* will not serve to concur with the minors in a discharge, but it must be a curator *ad negotia*, who cannot be chosen by the Lords, but only by the minor himself; and this is clear *per l. 7. § 2. D. de minor, si minor conveniat debitorem, adhibere debet curatores ut iis solvatur pecunia, alias non compellitur solvere*.—THE LORDS found the money being payable to Bailie Rae, the interposition of their authority was sufficient warrant to William Panton, the debtor, to pay. And he craving an assignation against William Gordon of Pencaitland, the principal debtor, the LORDS found, though the creditor was rigid in refusing an assignation, yet that they could not compel him; but the cautioner behaved to pursue, as accords, on his clause of relief. The *2d §. Institut Tit. Quib. licet alienare vel non*, is in the case of pupils and tutors, but not of minors and their curators paying their creditors, or receiving sums due to them by their debtors, where the minor consumes or dilapidates the same; for *minori habenti curatorem solutio sine illius auctoritate facta non exonerat debitorem*, and the minor is restored *contra istam solutionem, nisi pecunia extet, vel in rem minoris versa sit*.

Fol. Dic; v. 1. p. 221. Fountainhall; v. 1. p. 308.

1702. February 14.

HAY against TWEEDIE.

No 13.

A personal
creditor ad-
judging, tho'
he is bound
to accept of
payment
from another
personal cre-
ditor, can-
not be forced
to grant an
assignation,
but a dis-
charge only.

WILLIAM HAY of Drummelzier being a creditor to French of Kingledores, and adjudging his lands, compearance is made for Robert Tweedie, another creditor, who contends, You cannot adjudge, because I am willing immediately to pay your principal and annual rent, and true disbursed expences, *et nihil tibi deest*, you giving me an assignation to your right.—*Answered*, I am content, but I will give you nothing but a discharge, no law obliging me to assign; and you can be in no better case than the debtor who may redeem and pay, but can crave no more but a discharge and extinction of the debt; and at this rate there might be a circle, for another personal creditor may redeem from you, as you offer to do from me; and so you have no interest, unless you had affected

the lands by adjudication, or some other legal right.—*Replied*, It seems too grasping and malicious to refuse payment; and has our law no remedy to compel in such cases? For, why should you accumulate unnecessary expenses on the debtor, or co-creditors, by adjudging, and then claim your penalties and accumulations?—THE LORDS found a personal creditor, offering to pay, could not force him to give him an assignation; but declared, in the competition of the creditors, they would take this offer to consideration, how far it may then cut off accumulations now heaped on the debtor and co-creditors, and would count them as strictly as law would permit. It seems each of these parties had a design to purchase the lands.

Fol. Dic. v. 1. p. 221. Fountainhall, v. 2. p. 146.

No 13.

1708. July 23.

JAMES NICOLSON of Trabroun, and the Other CREDITORS of NICOLSON, against
The EARL of BALCARRAS.

In a process at the instance of the Creditors of Nicolson, against the Earl of Balcarras, for payment of 4000 merks contained in an heritable bond of corroboration, granted in anno 1652, by Alexander Lord Balcarras, the defender's father, to Sir Thomas Nicolson, King's Advocate, to which bond the pursuers have right by progress;

Alleged for the defender, absolvitor; because the bond pursued on relates to a principal bond granted for the same sum in May 1648, by the deceased John Duke of Lauderdale; and the said Lord Alexander, conjunctly and severally, which is not produced, and craved to be reduced by the defender, that he may be assoilzied from the bond of corroboration, as a relative writ, depending upon the original bond corroborated, and falling with it; seeing *non creditur referenti, nisi constet de relato*.

Alleged for the pursuer; The bond of corroboration is a new bond obligatory *per se*, and nowise depending upon the narrative of the former; and it hath been often found, that a bond of corroboration is a sufficient title to pursue, though the principal bond be lost or missing, *Beg contra Brown, voce TITLE TO PURSUE*; 24th February 1676, Johnston *contra* Orchardtoun, *voce TENOR*; for the maxim *non creditur referenti*, &c. holds only where there is a simple reference to a writ, and not where the relative writ is also dispositive.

Answered for the defender; Whatever might be pretended, had the principal and corroborative bonds been granted by the same person, (which is the case of the cited decisions,) in this case, where the original bond, granted by two *correi debendi*, is simply corroborated by one of them; law presumes, *imo*, That the principal bond wanting, contained a clause of relief by the Duke of

No 14.

A bond of corroboration, granted by one of two *correi debendi* in the bond corroborated, found to make the debtor liable for only half the sum, in respect the creditor did not produce the original bond, that he, who did corroborate, might operate his relief of the other half, against the co-principal therein bound.

No 14

Lauderdale, in favours of the Lord Balcarras, of which he is deprived through the want of the said bond; 2do, It is presumed, that the creditor got payment from the Duke, and retired his bond, seeing it cannot be produced; for the creditor was bound to keep up the original bond for the Earl's security and relief; and since the pursuers, by their own or their author's fault, are in no condition to relieve the Earl, or to afford him recourse against the Duke's representatives; he ought to be assoilized from the bond pursued on, and both bonds should be reduced and declared extinct, with all that has followed or may follow thereon.

Duplied for the pursuer; It may rather be presumed that the Duke of Lauderdale was only cautioner in the original bond, from the conception of the bond of corroboration, and the real security granted by the Lord Balcarras, without the least insinuation or reservation of relief against Lauderdale; 2do, A creditor lies under no tie to keep the bond corroborated, so as to be liable to the debtor, in case it be lost, *sine lata culpa*; for as the creditor thought himself secure by the new bond of corroboration, the debtor should have consulted his own security by a separate bond of relief, or a timeous pursuit for that effect.

THE LORDS sustained the defence, that the Lord Balcarras had relief against the Duke of Lauderdale for the one half of the sum in the bond of corroboration; in respect it bears that they were bound *in solidum* as co-principals by the bond corroborated; and the pursuers do not produce the said bond, that the defender might thereupon operate his relief of the other half against Lauderdale; but refused to assoilzie the defender totally, unless he prove that his father was bound only as cautioner.

Fol. Dic. v. 1. p. 222. Forbes, p. 272.

* * * Fountainhall reports the same case:

THE Earl of Lauderdale and the Lord Balcarras, in 1648, grant bond to Sir Thomas Nicolson, for 4000 merks. In 1652, Sir Thomas craving further security, he obtains an heritable bond of corroboration from Balcarras, narrating the former moveable bond, and obliging himself to infeft Sir Thomas in an annualrent effeiring to that principal sum, out of the Mains of Balcarras, whereupon he was actually infeft, and obtained a decreet for pointing of the ground. This right being adjudged by Trabroun from Sir Thomas's heirs, he pursues this Earl of Balcarras on the passive titles for payment.—*Alleged*, No process against me on the bond of corroboration, because the principal original bond corroborate is not produced; which if it were, it would evidently instruct that I was only cautioner for Lauderdale in the debt; and by your abstracting and withholding it I am deprived of my recourse and relief; and if you expect payment from me, you behoved to assign me to that bond, and deliver it to me, that I might thereby operate my relief; and I have raised reduction of it, and crave certification against it, and that I may be declared free of the debt ay till it be

produced ; and it must be presumed to have been paid by my Lord Lauderdale, seeing it does not now appear extant, but has been delivered up to him ; and the narrating of it can never supply its non existence, seeing *non creditur referenti nisi constat de relato*.—*Answered*, The Lords are come to a fixed custom upon this point, of sustaining process on bonds of corroboration, without producing the first bond corroborate, unless the party offer to prove the first bond satisfied, paid and retired, as is remarked by President Gilmour, July 1663, *Beg contra Brown voce TITLE TO PURSUE*; and by Dirleton, 24th February 1676, *Johnston contra Maxwell, voce TENOR*.

And this being tenaciously debated of new in 1707, the LORDS adhered, and found the brocard *non creditur referenti*, took place only where a writ made a bare and naked relation to another, but not where it proceeds to a new positive obligation, as this bond of corroboration does; and so is not merely relative, but dispositive; and *non constat* by the bond who was principal, and who was cautioner; or if they were both *correi debendi* and co-principals liable *in solidum*, without any clause of mutual relief, except what results *ex natura rei*.—THE LORDS having read the tenor of the bond, they found they were conjunct principals, as it is there narrated; and therefore, seeing by your negligence and deed in losing the first bond, I am wholly precluded and cut off from my relief against the Duke of Lauderdale's heirs *quoad* the half of the bond; therefore they assolzied Balcarras from the half of the debt, and decerned him in the other half, unless he would burden himself to prove that the debt was properly and wholly Lauderdale's, and he only cautioner; in which case they would assolzie him from the whole of the debt, because, by their default in losing the bond, he had also lost his relief.

Fountainhall, v. 2. p. 457.

1708. November 25. ADAMSON against BALMERINO.

JANET ADAMSON standing infeft in a ground-annual of L. 80 Scots yearly, to be uplifted out of some tenements lying in Leith, pursued my Lord Balmerino as heritor, and obtained a decreet against him in 1667. He now suspends on these reasons, *first*, That this annuity at its first constitution was out of two several tenements, at that time belonging to one man; so then it was no odds which of the tenements paid it; but now the same are come into different hands, and therefore the L. 80 should divide according to the value and proportion of the tenements, and my Lord is willing to pay his share.—THE LORDS found it affected each of them *in solidum*, but ordained the charger Adamson to assign my Lord to her action for obtaining his proportional relief from the heritor of the other lands. The *second* reason was, That her ground-annual ought to bear a part of the cess he pays for the said tenement; for though, in the original constitution, which is more than 100 years ago, there was no such provision, that was because there was no cess then imposed, and so was *casus*.

No 14.

No 15.

Found in conformity with No 3. p. 3346.

No 15.

incogitatus; but if such burdens had been then in being, it is impossible that heritors would have consented to make such ground-annuals absolutely free.—*Answered*, This ground-annual has been paid past memory, and never any such retention granted on account of cess, which evinces it has been designed for a free annuity; and they might as well plead, that an infeftment of annualrent might suffer deduction for cess, which was never pretended.—*Replied*, That prescription and immunity, though never so long, can never be obtruded against posterior supervenient acts of Parliament, imposing public burdens; and this ground-annual being relative to no sum on which it is made redeemable, it can be in no better case than an irredeemable right of property, which can plead no exemption from cess.—THE LORDS, in their reasoning, inclined to think, that such ground-annuals are not diminishable by cess, but did not decide at this time. They seem to be somewhat of the nature of a feu-duty, which payeth no part of the cess, but the property is only burdened with it; and they might as well plead, that ground-annuals should be liable to retention.

Fol. Dic. v. 1. p. 221. Fountainhall, v. 2. p. 465.

1712. February 12.

MARY SCOT, Spouse of PATRICK SCOT of Halkshaw, *against* ANN, DUTCHESS of BUCCLEUGH.

No 16.

One of two cautioners in a bond, having paid the debt on distress, and got a discharge thereof, action of relief was found competent to the distressed cautioner, against the other cautioner, notwithstanding a restriction in the assignation, which screened him only from the direction at the assignee's instance, but could not evacuate the implied obligation of relief among cautioners.

THE deceased Captain William Scot as principal, Walter Earl of Buccleugh, and John Scot of Sintoun as cautioners, having granted bond to Sir William Dick for L. 1000 Scots, with annualrent and penalty, which Sir William assigned to Sir John Scot of Scotstarbet, in so far as might be extended against the principal debtor and John Scot of Sintoun. This bond and assignation came by progress in the person of John Smith of Falla, who pursued Mary Scot, heir by progress to John Scot, one of the co-cautioners in the principal bond, for payment. She intimated the distress to the Dutchess of Buccleugh, who represented the Earl, the other co-cautioner, and being decerned to pay, and having paid upon distress the whole debt, and got a discharge thereof, pursued the Dutchess of Buccleugh as representing the Earl, the other co-cautioner, for relief of the one half.

Alleged for the defender; She can be liable in no relief to the pursuer, because, *1mo*, The bond, which is the ground of the process, was assigned by the original creditor to Sir John Scot, only in so far as might be extended against the principal debtor, and not against the Earl of Buccleugh; whereby the Earl was free from any action that could follow upon the restricted assignation, as effectually as if the creditor had discharged him; *2do*, The obligation of relief is prescribed *non utendo*, in so far as the bond was not only registred against John Scot of Sintoun in the year 1625, but a decret thereon recovered against

his heir in the year 1658, which was a sufficient distress to found action of relief, Vans *contra* Law, No 42. p. 2114.; and actions of warrandice or relief prescribed by elapsing of 40 years after distress or eviction.

Replied for the pursuer ; The restriction in the original conveyance did indeed bind up the assignees from direct action against the Earl of Buccleugh, and his representatives ; but the pursuer founds her action of relief against the Dutchess, not upon the original obligation and conveyance thereof, which are fully extinguished by the discharge ; but upon the common ground of law, which affords relief from one cautioner to another, upon payment *ex natura rei*, as *negotium utiliter gestum* for both. Though the creditor by the discharging, or granting a limited assignation, could have exonerated any of the cautioners of their obligation to him or his assignees, he could not by any deed of his extinguish the implied obligation arising from law betwixt the cautioners, or betwixt them and the principal debtor ; *2do*, Albeit the bond might prescribe in 40 years as to the creditor ; the obligation of relief could not prescribe against the cautioner, till the action itself was competent ; that is, when payment was made. Where there is an express obligation to relieve, the prescription runs from the time the receiver could pursue, viz. from the first appearance of distress, and he is not to wait for his own trouble ; but a cautioner having no relief written or implied against the co-cautioner, could not pursue till actual payment.

THE LORDS repelled the Dutchess's defences founded on the restriction of the assignation and prescription.

July 1. 1712.—In the action at the instance of the Lady Halkshaw, against the Dutchess of Buccleugh, 12th February 1712, for relieving the pursuer of the equal half of the sum in a bond granted by Captain Scot as principal, and the Earl of Buccleugh and John Scot of Sintoun as cautioners, to Sir William Dick, assigned by Sir William to Scotstarbet only against the principal, and Sintoun, which the pursuer, as representing Sintoun, paid upon distress ;

Alleged for the defender ; It was competent for the pursuer to have objected when she was distressed, that she could not be liable for the co-cautioner's share, whom the creditor had so liberated. For a creditor exacting payment *in solidum* from one cautioner, is obliged to assign against all the co-obligants, *L. 17. ff. de Fidejus. L. 11. C. eod.* Yet, cautioners are sometimes induced to engage for a debtor, in view of having a proportionable relief from the co-cautioners, if the principal should fail. And the original creditor, who by his fact of restricting the assignation, put his assignee out of capacity to assign more than the half of the sum, could not distress the pursuer for the whole : And if she hath officiously paid more, without proponing such an obvious defence, *sibi imputet* that she cannot insist for relief.

Replied for the pursuer ; The creditor stood under no obligation to assign this debt to the pursuer, upon payment ; and therefore she cannot be charged with omitting a defence or exception that was not relevant. For albeit, by the ci-

No 16. vil law, creditors were obliged *vendere caterorum Nomina ei qui solvere paratus erat* ; because by that law, neither *Correi debendi*, nor *Fidejussores* had relief nisi *Actio cessa fuerat*, or *ex Pacto* ; yet with us, though assignations may be requisite in some cases, where the party paying cannot have relief, co-principals and cautioners are liable in mutual relief *ex natura rei* ; and so the creditor, to whom the pursuer paid the debt, was under no necessity to assign the same to her, who had relief competent to her *aliunde*. Consequently, the pursuer had no relevant defence to save her from total payment against the creditor, who could not assign against the co-cautioner.

THE LORDS found, That the restricted quality in the assignation did not found a relevant defence to the pursuer, against paying more than the half of the debt.

Fdl. Dic. v. 1. p. 221. Forbes, p. 586. & 605.

* * * Fountainhall reports the same case.

Captain William Scot as principal, Walter Earl of Buccleugh, and John Scot of Sinton as cautioners, grant bond to William (afterwards Sir William Dick) for L. 1000 Scots in 1621. Sir William assigns this bond to Sir John Scot of Scots-tarbet, but with this express quality and restriction, in so far as might be extended against the principal debtor, and John Scot of Sinton, and no farther. Then it comes into the person of Patrick Porteous of Halkshaw, and he transfers it to John Smith of Falla, who pursues Mary Scot, the said Halkshaw's lady, and upon the passive titles as representing Scot of Sinton the cautioner, obtains a decret against her ; but she, during the dependence, intimates the distress to the Dutchess ; and being forced to pay, she with concurrence of her husband pursues the Dutchess as heir of the co-cautioner, to pay the half of the foresaid principal sum, annualrents, and penalties, because both our predecessors being bound *in solidum* to the creditor, I have paid the whole, and so liberate you of that half fell to you ; which being *utiliter gestum* for you, it obliges you to pay me back your share. *Alleged* for the Dutchess ; you can neither have regress nor relief against me, as representing the other co-cautioner ; because the bond, the ground of your process, was assigned by Sir William Dick the original creditor, only in so far as might be extended against the principal, and Scot of Sinton, but not against the Earl of Buccleugh. *2do*, The bond was once established in Halkshaw, your husband's person, with the same restricting quality ; whose acceptance of it must operate the Dutchess's liberation against his assignees, and his wife, or rather his own payment ; that being a plain contrivance to found a process against her, and so must exclude the Lady Halkshaw's relief, founded on a collusive decret patched up in the trust betwixt them. *Answered*, the pursuer founds nothing on the assignation, but on the common inviolable ground of law, that affords one cautioner relief against another *pro rata*,

when I have paid the whole, and so *negotium tuum utiliter gessi*, arising *ex natura rei* without any assignation. And the translation of it to her husband can never prejudice her, he had it *tanquam quilibet*, and can never be charged with collusion; for *in limine* of Smith's action against her, she intimated the plea to the Dutchess, who should have defended her, but had nothing to say against the debt. *Replied*, That Dick, the creditor, could have discharged Buccleugh, and by so doing have liberate him of the bond; and here he hath done the equivalent, by assigning it allenarly against the principal and one of the cautioners, and not against the other; and the common law did not sustain any such regress, but where they were expressly assigned thereto by the creditor *l. 17. D. de fidejussor. § l. 11. C. eod. tit. ita fidejussoribus succuritur, ut compellatur creditor ei qui solvere paratus est caterorum nomina vendere*; and therefore Halkshaw and his Lady not having craved an assignation, they can never burden the co-cautioner, especially having taken a restricted assignation; for *limitata causa limitatum producit effectum*. *Duplied*, This equipollency betwixt a qualified assignation and a discharge, is a plain sophism, extending the conclusion beyond the premises; for it is not in the creditor's power to give away or extinguish a cautioner's right of recurring either against the principal or the conjunct cautioners; for *pactis privatorum non derogatur juri communi*: and it will not admit of any convincing reasoning, to say that the creditor can loose or dispense with the mutual relief cautioners owe one another: He can discharge the whole debt when he will, but not the subaltern obligations among the *correi debendi*. And that part of the Roman law takes no place with us; for they were so precisely nice in their forms, they allowed cautioners no recourse but *ubi actio cessa fuit*, which answers to the stile of our assignations: And they had the three remedies, *divisionis, ordinis* in discussing, and *actionum cedendarum*, so they had no relief *nisi ex pacto*; but with us it arises *ex natura negotii* without any stipulation. THE LORDS repelled the Dutchess's defence on the restriction; and found it did not debar the Lady Halkshaw pursuer from seeking relief of the half: Though several of the Lords were of a different opinion. *2do, Alleged* for the Dutchess; this pursuit was prescribed, because 40 years are run since 1658, at which time Sinton was first distressed; and he did not insist on his obligation for the space of 40 years after, and so has lost it *non utendo*. *Answered*, there is a great difference betwixt the obligation itself, and the obligation of relief resulting to the cautioner therefrom; the bond prescribes from its date, at least from its term of payment; but the relief never begins to prescribe till actual payment be made by one of the cautioners, and only 40 years negligence after that loses and extinguishes it. It is true, warrandice prescribes not only from the eviction, but from the distress; but it is not so in reliefs, where it only commences from the payment. *Replied*, This distinction is groundless; for the Lords have found relief competent even before payment, as Vanse *contra* Law, No 42. p. 2114.; yea, an adjudication of a principal debtor's estate was permitted to go on, at the

- No 16. instance of a debtor distressed by a charge of horning, though no payment made, No 12. p. 140.; and a delaratory action was certainly competent to her and her cedents against the Dutchess, after the decret 158, that the Dutchess on payment should be liable to relieve her *pro rata*. *Duplied*, The case of the decisions cited are where there is an express obligation to relieve, either indefinitely or *ad certam diem*; which is not the case here: And the declaratory action, invented by the Dutchess's lawyers, is an chimerical imagination, having no more foundation in law than if a creditor, by a conditional bond, should immediately before existence of the condition raise a declarator against the grantor, that his bond shall be effectual when the condition shall happen to exist; which would certainly be considered an empty airy process. THE LORDS repelled this second defence of prescription. *3tio*, *Alleged* for the Dutchess; that the pursuer, as heir, and deriving right from Sir John Scot, can have no right to this bond, it being moveable; for though it was heritable as bearing annualrent, and prior to the act of parliament 1641, yet the decret taken on it in 1658 made it moveable, even as bonds bearing infeftment became moveable by requisition, as Stair observes *lib. 2. tit. 1. § 4*; and Nasmith *contra* Ruthven, *voce* HERITABLE AND MOVEABLE; and Fairholm *contra* Montgomery, *voce* PASSIVE TITLE: and heritable bonds are rendered moveable by any intimation the creditor makes, to express his mind not to let the money lie any more in the debtor's hand, but to lift it. Now the taking a decret signifies abundantly his design to have his money, and so being moveable, this sum fell to the executors, and is not validly conveyed to this pursuer by the heir. *Answered*, The taking a decret is no indication of the creditor's mind to have his money; seeing no charge of horning, arrestment, or other diligence followed thereon for many years thereafter; so it is not the commencement or first step of diligence that alters or changes the nature of an heritable bond, but the continuation thereof by horning, requisition, or the like explicit deeds, which is the case of the decision adduced; and even where horning or requisition has been used, they return to be heritable, if he for a considerable space desist from farther diligence, or accept of his annualrents: So that decret was no more but a constitution of the debt, and no declared resolution to lift the money. THE LORDS found the decret did not make the bond moveable, unless a charge of horning had followed thereon. See HERITABLE AND MOVEABLE.

Fountainhall, v. 2. p. 731.

1731. February.

GRAHAM against LITTLE.

No 17.

A GRANTER of a bond of presentation having paid the debt, upon failing to present the person of the debtor, and having taken an assignation, was not found entitled to relief against the cautioners in the original bond. See APPENDIX.

Fol. Dic. v. 1. p. 222.

S E C T II.

A preferable creditor can do no voluntary deed to prefer one secondary creditor to another; and if he take payment out of one subject, he is bound to assign to postponed creditors.

1672. July 19.

CHIESLY *against* HAY.

MR William Chiesly and Mr Andrew Hay, having apprised the same lands within year and day, Mr William insisting for mails and duties, Mr Andrew craved to come in *pari passu*; Mr William craved satisfaction of the composition paid to the superior, conform to the act of parliament; Mr Andrew alleged that he had inhibition upon sums in his apprising, and reduction thereupon, of Mr William's right, as being upon sums after the inhibition: Mr William offered to purge and satisfy these sums now within the legal, which would evacuate the reduction; and craved that Mr Andrew might assign him to the inhibition, as is ordinary in such cases. It was *answered*, that he ought not to be decerned to assign his inhibition to his own lesion, for thereby Mr William would reduce his apprising, as to the other sums that were after the inhibition.

THE LORDS found Mr Andrew only obliged to assign the inhibition, so that it should have no effect against his own sums:

Fol. Dic. v. 1. p. 222. Stair, v. 2. p. 108.

No 18.

In a competition an adjudger subjected to an inhibition offering to purge by payment of the debt, the creditor was found obliged to assign his inhibition, but not in so far as it might be prejudicial to other debts in his person.

1676. February 11.

BRUCE *against* MITCHEL.

JOHN MITCHEL stabler having apprised the lands of Lethangie, pursues a reduction of the infestment of these lands granted to Jean Shaw by the common debtor, for security of a sum of money, *ex capite inhibitionis*, because there was inhibition upon one of the sums in the apprising, anterior to that disposition. In which process, Sir William Bruce having right from the defender, offered to purge the inhibition for payment of the sum, he always getting assignation to the sum and inhibition, which THE LORDS sustained. It is now *alleged* for Mitchel, that he was not obliged to grant an assignation, but only a discharge; for albeit the Lords do sometimes ordain creditors to assign diligences or securities to the cautioners whom they distress, for making of their relief against the principal debtor, or in other cases where the party can show no prejudice; yet that is never done where the party hath prejudice, as in this case; for if Mitchel assign the inhibition, it will be a ground to reduce his other bonds on which his apprising proceeds, being posterior to the inhibition, and likewise a disposition of the lands from the heir of the common author.

THE LORDS ordained the assignation with this provision, that it should not be made use of against his other rights.

Fol. Dic. v. 1. p. 222. Stair, v. 2. p. 414.

No 19.

Found as above.

No 19.

. Gosford reports the same case.

IN a double poinding, raised by the tenants of Lethangie, against the creditors of William and Robert Shaws, Patrick Tullos being preferred, as having the first infeftment, John Mitchel as assignee by one Mercer who had served inhibition before Tullos's right, did insist in his reduction *ex capite inhibitionis*. It was answered for Patrick Tullos and Sir William Bruce, who was content to advance the money as being cousin-german to Robert Shaw of Lethangie, that they were instantly content to purge the inhibition by payment of the debt which was the ground thereof, Mitchel assigning them to his right; whereupon the money being consigned by the Lord Ordinary in the clerk's hand, until a disposition should be drawn and subscribed by John Mitchel,—it was alleged for Mitchel, who was again admitted to be heard, *first*, that he was content to pass from that reason of reduction *ex capite inhibitionis*, and to insist upon other reasons libelled; viz, that Tullos's right was a right of trust made to a confident person; *2do*, Albeit a con-creditor may purge a prior inhibition, yet the server of the inhibition is not obliged to dispoise his right, seeing he might have other rights besides, which was Mitchel's case, who had led a comprising at his own instance, and if he should dispoise his right flowing from Mercer, with the inhibition, whensoever he should insist in his other right and comprising, then they should reduce his right upon the said inhibition, and force him of new to purge, and upon the reason now urged he would be forced to dispoise back again that inhibition, *et sic infinitum*. It was answered, that by the daily practice cautioners being distrest at the instance of creditors, upon offers to satisfy and purge the debt, the creditor is always decerned to dispoise his right, to the effect they may recover relief from the common debtor, like as Sir William Bruce and Patrick Tullos were content to take it with that quality, that it should only affect the common debtors's estate, and should not prejudice Mitchel of any other right of comprising, as accords; neither could he now refuse to take up the consigned money and grant the disposition, nor pass from his reason of reduction, *ex capite inhibitionis*, because he had insisted thereupon by the space of two years; and after a full debate *in praesentia*, interlocutor was given and pronounced. THE LORDS did find that Mitchel should grant a disposition, but affected with that quality, that it should be without prejudice of any other right, which was fully reserved, as accords, and that he should assign to the inhibition, *ad hunc effectum*, that Tullos might recover payment against the common debtor out of his estate, so that all other rights posterior to the inhibition should come in and be preferred according to their priority, and public infeftment.

Gosford, MS. No 850. p. 538.

1678. November 6. MILN against HAY.

No 20.

A CREDITOR being preferable over two tenements, and a secondary creditor having right only over one of them, in that situation, the preferable creditor for a separate debt, adjudged both tenements. It was FOUND, that the catholic creditor was not obliged to dispoise to the secondary creditor in prejudice of his adjudication, existing before the date of the process.

Fol. Dic. v. 1. p. 222.

. See this case, *vide* BASE INFESTMENT, No 62. p. 1341.

1693. February 1.

The LADY GUNSGREEN against HELEN LAUDER, and Mr JAMES LAUDER, Provest of Haddington, her Husband.

No 21.

THE LORDS would not force the Lady, in this case, to assign upon payment, having sundry rights in her person, unless all were satisfied; and thought it not sufficient to declare, in the assignation, that it should not prejudice the other rights; but they found, that the Lady having two subjects out of which she could lift her annualrent, in the one of which Helen Lauder was infest, and in the other not; though *regulariter* the liferentrix could not be restricted to one of the lands more than to the other, yet the LORDS declared they would ordain her to assign her right on payment; or else to distress and do diligence first against that land wherein Helen Lauder had no right; with this quality, that what after diligence, she could not recover out of that land, she might recur *pro tanto* against the other; and where there is a concurrence of creditors, the LORDS use to allow the first annualrenter to poind within 20 days of the term, and the second not to have access till that space be expired.

Fol. Dic. v. 1. p. 222. Fountainball, v. 1. p. 552.

1696. January 3. SCOTLAND against BAIRDNER.

No 22.

PHILIPHAUGH reported Mr William Scotland, the chancellor's chaplain, against Thomas Bairdner of Cultmilne. The pursuer, as assignee by a liferentrix, convenes this defender for his possession of the liferented lands; who *alleges*, he has right to two infestments of annualrent, which being preferable to the widow, exhaust the subject. *Objected*, These annualrents were universal over the whole; whereas the widow's liferent was only out of a half; and the other being sufficient to pay it, they ought to restrict thereto, at least to assign

A person had an infestment affecting a whole subject. A liferentrix had an infestment affecting the half, but posterior. The

No 22.
first had also
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adjudication.

the relict to the other half seeing *nemo debet uti jure suo in æmulationem alterius*. *Answered*, In all infeftments of annualrent, *unaquæque gleba servit*, and the creditor may distress any part of the tenement wherein he stands infeft; yet he acknowledges this is not to be used with rigour and judaically, and that the Lords, in such a case, would ordain the annualrenter to assign where he has no prejudice. But if he have another right upon the rest, law will not oblige him to assign to the prejudice of his separate right; and this defender has right to an adjudication on the other half of these lands, and which being posterior to her liferent infeftment, it would wrong his own right to cause him assign, and involve him in a plea. *Replied*, If both the debts were originally his own, he might, in that case, protect, cover and defend his lamer right, by extending the preferable one over the whole subject; but if he has acquired and purchased in rights, which of themselves are not preferable, it should be in the power of a creditor, at this rate, by an unlawful gratification, to prefer one creditor to another, who would otherwise be clearly preferable to him, conform to the brocard, *si vinco vincentem tunc te vinco*, as was determined in the competition among the creditors of Lanton* and Nicolson†. THE LORDS thought, if he acquired in any such right less preferable *post litem motam*, after a citation in the multiple-poiding, or after the competition was started, he might be reputed *in mala fide* to make use of such a right, to impede his assigning to the liferentrix; but, if he had got it before, there was no law hindering him to do the same, and to cover it by his better right; and therefore the LORDS would not decern him to assign the relict against the other half in prejudice of his adjudication. Then it was *contended* for the relict, That her liferent was not out of a precise and definitive half, but was general, *unius dimidietatis terrarum et molendini*; and so not being restricted to an east or west half, but to an half *pro indiviso* over the whole, and the one half being able to pay this defender the preferable annualrents, she may, without any assignation, recur upon the other half; in which case, he cannot obtrude his adjudication against her, in regard it is long posterior to her right. The LORDS thought this a relevant ground to prefer her to the superplus rent after the annualrents were first paid, if her infeftment run in these indefinite terms.

Fol. Dic. v. 1. p. 223. Fountainball, v. 1. p. 696.

1705. December 19.

JAMES MANN, late Bailie in Dundee, *against* ALEXANDER REID, Bailie there.

No 23.
An assigna-
tion by a
bankrupt to
his creditor
being reduced
on the act
1696, at the

ALEXANDER REID having gotten from Andrew Wales merchant in Dundee a disposition to, and delivery of some goods in security of a debt; James Mann, another creditor to Alexander Wales, arrested in Alexander Reid's hand, and having obtained reduction of the disposition as made after Wales was under horn-

* No 94. p. 2877.

† No 92. p. 2876.

ing and caption, and within 60 days of his flying and absconding, he insisted in a furthcoming against Alexander Reid.

Alleged for the defender; That he could not be obliged to make furthcoming the goods disposed or value thereof to the pursuer, unless he would assign his debt and diligence *pro tanto*, as is ordinary in competition of creditors.

Replied for the pursuer; That he was only obliged to discharge, and not to assign; payment being required out of the common debtor's effects, which being made, extinguishes the debt, so as it cannot be assigned to fortify another creditor's debt against which there may be lawful objections. Nor is there here any competition of rights, the defender's disposition being reduced and declared null as a fraudulent deed. *2do*, The *beneficium cedendarum actionum* can neither take place where the person craving it is not prejudiced by a discharge of the diligence to be assigned, nor where the other party would suffer prejudice by the assignment. Now the pursuer's discharging his debt is no loss to the defender, since thereby the deed and diligence in his favours may revive; and the pursuer would be greatly hurt by conveying his debt and diligence to the defender, since he gets not complete payment. Whereas *beneficium cedendarum actionum sine dispendio creditoris futurum est*, l. 38. ff. de evictionibus; and a creditor is not bound to assign his right to a cautioner making payment *prius quam omne debitum exsolvatur*, l. 2. C. de fidejussoribus. Therefore the pursuer cannot be obliged to assign a part of his diligence to compete with himself. *3tio*, Who knows but the defender might accommodate a third party with the diligence assigned, and he a fourth, and so on, which would breed confusion.

No 23.
instance of another creditor, the assignee craved assignation from the pursuer of the reduction, that he might operate his relief out of the common debtor's funds. The Lords ordained the pursuer to assign, but with this quality, that the pursuer should be preferred *quoad* his debt, and the assignee should not compete with him for it.

Duplied for the defender: It is true if the debtor himself were pursued he behoved to hold himself content with a discharge; but the pursuer must transmit to a creditor making payment, since he gets his money rather out of the defender's effects than out of the common debtor's; for, in the civil law, 'Hy pothecarius posterior priori hypothecario solvens, ipso jure surrogatur in ejus locum, et privilegium.' And with us the pursuer of a reduction *ex capite inhibitionis* receiving payment from the defender, is bound to assign with this quality that the conveyance should not be made use of against his other rights. Bruce *contra* Mitchel, No 19. p. 3365. As creditors must assign to cautioners distressed upon payment made by them; a wadsetter must convey to a singular successor having right to a reversion, Stair, Instit. lib. 2. tit. 10. § 13. And a second appriser, by redeeming a first, comes *ipso facto* in his right, Gordon *contra* Watson, No 4. p. 318. *2do*, The pursuer can pretend no prejudice, since the defender is content that the assignation be burdened with the reservation of what more is due to the pursuer, and that it be not made use of against him.

THE LORDS found Bailie Mann the pursuer obliged to assign, with reservation and preference of what debt was yet then resting to himself.

Fol. Dic. v. 1. p. 223. Forbes p. 55.

19 K

No 23.

*** Fountainhall reports the same case :

BOTH Reid and Mann being creditors to Andrew Wall, (mentioned No 113: p. 1006), Bailie Reid offered to pay what he had confessed himself to be debtor by his oath in the furthcoming, but craved an assignation from James Mann to his cumulative security by adjudication, in so far as he should pay, that so he may recover his relief out of the common debtor's effects *pro tanto*. *Answered* for Mann, I cannot assign you to my adjudication, because that were to my own prejudice, seeing by all I recover from you I am not fully paid of my sum, but still want L. 300 of it, besides penalties and accumulations, which he extends no farther than to re-imburse his true expenses; and no man can be forced to assign *cum proprio dispendio*. *Replied*, The assigning is founded both on natural equity and common law, the *jus cedendarum actionum* being never denied, and *les loix civiles dans leur ordre naturelle*, speaking of creditors competing on hypothecs, says, 'Posterior hypothecarius solvens hypothecario priori, ipso jure surrogatur in ejus locum et privilegium.' And in a reduction *ex capite inhibitionis*, the pursuer was decerned to assign to the defender who paid him with this quality and provision, that the assignation should not be made use of against the cedent's other debts and rights, Bruce *contra* Mitchell, No 19. p. 3365.; 18th July 1676, Gordon *contra* Watson, No 4. p. 318. And Bailie Reid was content that the assignation he was craving should be clogged with that reservation, that it should never be made use of against the cedent, so that he, by virtue of that assignation, coming in *pari passu* with the other creditors, and drawing his share, he was willing that James Mann should, out of his share, be refunded of what was yet resting him, so as Reid might get what remained, which comes under the rule *vinco vincentem*. THE LORDS found the defence relevant, and ordained Mann to assign; but with this express burden and quality, that Mr Mann should be preferred *quoad* his debt, and Reid the assignee should not compete with him for the same.

Fountainhall, v. 2. p. 301.

1708. February 24.

WILLIAM KENNEDY of Daljarroch *against* JOHN VANS, and HUGH CRAWFORD, Merchants in Ayr.

No 24.

A creditor, by bond, in which three persons were bound as co-principals, being the first arrester of a subject be-

IN the competition betwixt John Vans and Hugh Crawford, as arresters of a share in the African stock belonging to David Ferguson their debtor, and William Kennedy of Daljarroch, who had also arrested the same as creditor to David Ferguson per bond, wherein he, Thomas M'Jarow, and John Ferguson stood bound co-principals; Daljarroch being preferred, and thereby having re-

covered payment of all that was due to him, John Vans and Hugh Crawford craved that he might be decerned to assign his bond to them, for recovering, off the other two co-principals therein, the superplus of what was paid out of David Ferguson's effects more than this third share; in respect Vans and Crawford, as come in David Ferguson their debtor's place, should have the same relief that was competent to him.

Alleged for Daljarroch: He is not bound to assign the relief competent to David Ferguson against these bound with him; in respect the competitors neither derive right thereto from David Ferguson, nor have affected the same by legal diligence? for their being frustrated of payment out of the equivalent by Daljarroch's preference, entitles them only to seek assignation of his debt and diligence for operating their payment out of other effects belonging to the common debtor; but Daljarroch is not obliged to assign his right and diligence in so far as concerns third parties to whom Vans and Crawford are not creditors.

Answered for Vans and Crawford: In all competitions of creditors, where one having double security for his money, restricts his payment to one subject, and thereby excludes a co-creditor who had affected that subject, the creditor preferred is obliged to assign what further security he had to the other, though that other had not affected that additional security by diligence.

THE LORDS found, That Daljarroch is not bound to assign; because, Vans and Crawford had not affected by diligence the clause of relief in the bond granted to him.

Fol. Dic. v. 1. p. 224. Forbes, p. 249.

1710. December 21.

JEAN PITCAIRN, Relict of MR JOHN AINSWORTH Merchant in Edinburgh,
against THOMAS HALIDAY Bailie of Selkirk.

IN the poiding of the ground at the instance of Jean Pitcairn, as having right to an infeftment of annualrent effeiring to 1000 merks of principal, granted by James Mitchelhill in his lands of Kingscroft, dated and registered in the year 1704; Thomas Haliday, who had an infeftment of annualrent out of the same lands in anno 1701, and also out of James Mitchelhill's burrow-lands in Selkirk in the year 1700, for the principal sum of L. 1280, and another infeftment of annualrent out of the foresaid lands of Kingscroft, and burrow-lands in the year 1707, for the accumulate sum of L. 2000 compeared and claimed the whole annualrent of his L. 1280 out of the lands of Kingscroft, by virtue of his first and preferable infeftment.

Alleged for Jean Pitcairn: Seeing Haliday stands infeft both in the Kingscroft and burrow-lands, if he takes his whole annualrent out of Kingscroft, he

19 K 2

No 24.

longing to of his debtors, was found not obliged to assign his bond to the other arresters, for recovering from the other two co-principals the superplus paid to him out of the common debtor's effects, more than his third share, altho' relief of two-thirds was competent to the common debtor himself against these co-principals.

No 25.

The Lords found, where a posterior creditor pays a prior out of his own money, then he ought to assign simply; but if he has left him only to get his payment out of the debtor's means, he is not obliged to assign, except with a quality and

No 25.
reservation
that it
should not
prejudice his
other debts
and rights,
though pos-
terior to
those of the
party craving
the assigna-
tion.

must assign her to his infeftment out of the burrow-lands, to the end she may get payment of her annualrent.

Replied for Thomas Haliday : Seeing he hath another infeftment furth of both lands for the accumulate sum of L. 2000 posterior to Pitcairn's infeftment in Kingscroft, he may take his first infeftment subservient to the other, and cannot be obliged to assign it to her to affect the burrow lands till he get payment of both. For albeit a preferable creditor who having right to poind the ground of several lands for one and the same annualrent, maliciously, without any benefit arising to himself, exacts the whole out of one, to the prejudice of a posterior creditor infeft therein, may be ordained to assign the posterior creditor to his right upon the rest, in so far as may extend to the proportion of annualrent that fell to be taken furth thereof, had he poinded all equally ; *cum jus civile non indulgeat malitiis* ; yet when a person can shew any prejudice he may sustain by doing such a neighbourly office, he may very well say, *Ego met mihi proximus*, charity begins at home, and he cannot be obliged to assign to his own loss, *Nemini enim fraudem facit, qui jure suo utitur*, l. 55. ff. de Reg. Jur. And it was so decided in a parallel case, February 11th 1676, Bruce contra Mitchell, No 19. p. 3365.

Duplied for Jean Pitcairn : One is not indeed obliged to assign a prior personal right, in prejudice of a posterior competent to him ; there being no record of personal rights to certiorate creditors thereof ; but since the real burdens upon heritage are patent upon record, a person having an universal infeftment cannot *bona fide* acquire any new right in prejudice of an anterior particular infeftment competent to another, and therefore if he draw his payment by virtue of the transcendent infeftment out of the particular subject affected by that other, *in æmulationem vicini*, he must assign to the party so excluded. Otherwise, a debtor granting a general infeftment to one creditor, would be obliged to grant general infeftments to all : whereas law hath rather encouraged the taking special rights, and therefore introduced special adjudications of lands equivalent to the sums.

THE LORDS were all clear that an annualrenter might take his payment out of any tenement in which he hath got infeftment from the debtor, and that if he get payment out of the debtor's effects, it extinguisheth the security ; so as it cannot be assigned to another creditor. But found, That if Haliday receive payment from Pitcairn out of her own means, he is obliged to assign to Pitcairn for a proportionable relief, with this quality, That the same should not be made use of against Haliday's other infeftment.

Fol. Dic. v. 1. p. 223. Forbes, p. 458.

* * * Fountainhall reports the same case :

JEAN PITCAIRN being infeft in an annualrent corresponding to the principal sum of 1000 merks out of the lands of Kingscrofts, belonging to Bailie Mit-

chell of Selkrig, and pursuing a poinding of the ground, compearance is made for Thomas Haliday, who produces two infeftments, both out of the Kingscrofts, and likewise some acres and tenements of land, the first for L. 1200 Scots prior to her's, and the second made up by accumulation of the annualrents of the first sum, and some accessions, for L. 2000, but posterior to her infeftment. The ranking of these rights were very plain, his first bond *primo loco*; her infeftment *secundo loco*; and his second bond *tertio loco*. But the difficulty arose, that she *contended* that he having two subjects for uplifting his first annualrent, he ought not to lay it all on the lands of Kingscrofts, wherein she was only infeft; but, having likewise the burrow-acres and houses, whereto she had no right, he should take his annualrent out of both; and if he would *ex æmulatione* and invidiously burden her lands by taking the whole out of them, then he ought in reason to assign her to a proportion, so far as she wanted, and was evicted to him, that she might be *indemnis* by getting it made up out of the other subject. *Answered*; No law obliged him to assign where he was paid by the debtor's own means, rents, and effects; for that extinguished the debt *pro tanto*, and were to assign a *non-ens*. But much less when the assignation would be to his evident hurt; for, he having a posterior infeftment out of both lands, he spared the burrow-acres as to his first debt, and affected them with the annualrents of his second bond, which she could neither hinder nor quarrel, not being infeft therein; and if he did assign, it must be with this express quality and condition that she should not make use of his assignation to the prejudice of his other rights; and this cannot be reckoned malice, seeing *nemini fraudem facit qui jure suo utitur*, and it was so decided 11th February 1676, Bruce *contra* Mitchell, No 19. p. 3365. She *alleged*, That in so far as his second bond was made up of the bygone annualrents of the first she allowed them to be privileged, but the *anatocismus*, making these to bear annualrent, was unfavourable in law. THE LORDS found where a posterior creditor pays a prior out of his own money, then he ought to assign simply; but if he left him only to get his payment out of the debtor's means, he was not obliged to assign, but with a quality and reservation that it should not prejudice his other debts and rights, though posterior to the party craving the assignation.

Fountainball, v. 2. p. 612.

1714. June 29.

WILLIAM KER of Chatto *against* WALTER SCOT of Wool and other CREDITORS of Sir WILLIAM SCOT of Harden.

No 26.

ROBERT SCOT of ———, who was served and retoured heir-general to his brother, Sir William Scot of Harden, but not served heir in special to him in his estates, having granted to William Ker of Chatto, his brother-in-law, a general disposition and assignation of his whole moveable goods and gear, debts

A person served heir in general, and confirmed executor to another, executed a general disposition in favour of a —

No 26.
third party.
The general
disposnee be-
ing excluded
by preferable
creditors, de-
manded assign-
ation from
them.
Answered, No
person is en-
titled to de-
mand assigna-
tion, unless
against his
own debtor's
effects. They
were found
not bound to
assign.

and sums of money, heritable and moveable; upon which assignation, Chatto, after Robert Scot's death, having commenced a process against several of the debtors in the said disposition; compearance was made for Scot of Wool and others, originally creditors to Sir William, and also to Robert, as representing him who excluded Chatto by their preference.

Alleged for Chatto; That he being creditor to Robert by the warrandice of the said assignation, those creditors of Sir William ought to assign him to their debts and diligences upon the estate of Harden, in so far as he cannot get payment out of Robert Scot's effects by their debarring him, which necessity of assigning is introduced by the civil law, *l. 13. ff. de fidejuss. l. 38. 39. ff. de evict. l. 19. ff. qui pot. in pign.* approved by the universal consent of all the judicatures of Europe and opinion of the doctors, *Sande de action. cess. cap. 6. § 63. Voet. comm. in tit. ff. qui pot. in pign. § 5*, and founded in material equity and justice. *Factum quod mihi prodesse potest ipsi vero nihil nociturum hoc equitas suggerit.* When a person having a slender right to a subject, is attacked by one having a better, he who is preferred, cannot refuse making over his right, upon the other's paying all his just demands; or, if a creditor had two subjects disposed for his payment, out of either of which he can receive his payment, and do *in amulationem* of the possessor of one, draw his payment entirely furth thereof, justice requires that he should assign his diligence to the person distressed, to the end he may draw his relief out of the other; which is the present case. For Scot of Wool is heritably secured in the estate of Harden, out of which he may very easily recover his payment; and yet, he rather chuseth to draw it out of Robert Scot's effects, whose creditors have no other fund for their payment, in which, if Wool be preferred, without being obliged to assign, they will be entirely defrauded. This is also agreeable to our custom; for, as Dirleton observes, *Doubts of Law, Tit. DAMNUM, Si quis utatur jure suo ut vianus potius noceat quam sibi prosit, illicitum est et prohiberi potest. Quia magis jure suo abuti quam uti videtur.* And daily, in ranking of creditors, where an adjudication is led upon a bond, granted by two or three co-principals, and their estates adjudged thereon, if the creditor take payment out of one of these estates to the prejudice of co-creditors upon that estate, he will be obliged to assign his debt and diligence in favour of the creditors postponed, to the end they may affect the other estate. For the other co-obligants, being equally bound, and their estates affected for payment, it were most iniquitous that the estate of one should pay the whole debt, and the others nothing.

Answered for Scot of Wool and Others; True, the common law allowed assignation in two or three cases, as to a *correus* or *fidejussor* making payment, which arose from a tacit mandate supposed to intervene betwixt the *correi* or betwixt principal and cautioner. But, it is needless to take notice of any of the texts of the civil law, concerning *beneficium cedendarum actionem*, competent to *correi* and cautioners, which have no place here. Another case is, where a posterior creditor making payment to one who is preferred, gets assignation from

the payer; but there, the preferable debt is paid out of another's effects, and not out of those belonging to the common debtor. But none of these, or the other cases cited by Chatto, come home to the question where Wool and the other Creditors are getting their payments out of their debtor's effects, Robert Scot, as well as Sir William, being debtor to them as served heir in general to Sir William; and, where Chatto is seeking to be assigned to rights upon an estate, viz. Sir William's, which belonged not to his debtor, Robert Scot, who was never infeft therein, and could not be affected by diligence for his debt. Consequently, neither can Robert's creditors claim to be assigned thereto, seeing a legal fiction never operates an impossibility. And a habile case must be supposed, that at the time the assignation is sought, the demander could otherwise affect the subject in law. So the Lords found in a late parallel case, Colonel Charteris against the Younger Children of the Lord Phesdo, that the younger children, who were preferred as creditors upon their eldest brother's estate to Colonel Charteris, another creditor, were not obliged to assign him to some other effects which the father had also disposed to them, in security of their debt; because the father was not debtor to the Colonel, and he could not seek assignation to an estate not belonging to his debtor*. Again, where in a ranking, an adjudger of more subjects excludes a partial annualrenter, this adjudger will be obliged to assign, that the assignee may recover payment out of the other subject where he had no infeftment. But this will never be granted where there is either prejudice to the cedent or to a third party, or where the assignee could not have affected the subject by diligence, and hath not one common debtor with the cedent. Upon this ground it is, that Scot of Wool, one of the heirs of entail to Sir William Scot, contends, that he will not suffer his estate to be taken away by debts, which neither he nor his estate is subject to, having a *jus quæsitum* to hinder all assignation to his prejudice. 2do, It is of no moment for Chatto to say, that Robert Scot's estate should go for the payment of his own debt, and not to be carried away by Sir William's creditors. For, 1mo, Robert being debtor to Sir William's creditors, by his representing Sir William, as heir in general, they will affect the readiest. But then, this did not entitle Robert's creditors to affect Sir William's special estate, to which Robert never established a right by special service, nor his creditors by charging him to enter heir in special, and adjudging thereon. 2do, The subject out of which Sir William's creditors are claiming their payment, consisted chiefly of bonds, heritable and moveable, belonging to Sir William, to which Robert, by a general service and confirmation, established a right.

THE LORDS found, That, in so far as Sir William Scot's creditors are either paid out of his estate, or preferred out of his effects for their payment, they are not bound to assign their debts and diligences in favour of Chatto.

Fol. Dic. v. 1. p. 224. Farber, MS. p. 70.

* See PROVISIONS TO HEIRS AND CHILDREN.

1715. February 22. BRIGADIER PRESTON *against* COLONEL ERSKINE.

No 27.

Creditors not bound to assign, when to their own prejudice.

BRIGADIER PRESTON, purchaser of the estate of Valleyfield, at a roup, gave in a petition to the Lords, representing, that he was preferable creditor, or had paid the whole price to the preferable creditors; and therefore craving up his bond, conform to the 6th act, Parliament 1695.

The Brigadier gave in a scheme of the decreet of preference, and of the rights acquired by him to the debts preferred, whereby it did appear, that some debts preferred, to which the Brigadier had right, were preferable over the whole estate of Valleyfield. Other rights, which the Brigadier had also purchased, were preferable upon particular parts of the said estate, but did not affect the whole or any other part. And the Brigadier, in the scheme of the payment of the price, did pretend to exhaust the value of the particular lands of Valleyfield, with those rights that were found preferable over the whole estate.

Colonel Erskine objected, and *alleged*, That these debts that were preferable upon the whole estate ought to be taken off the whole head of the price, whereby the value of every particular part of the estate would be diminished proportionally; which was just in itself, and whereby Colonel Erskine would get a share of the price, and otherwise would be wholly excluded; because, by the Brigadier's scheme, he pretends to exhaust the value of the lands of Valleyfield entirely, by the sovereign rights that go over the whole estate, and leaves no fund to the Colonel, whose diligence affects the lands of Valleyfield. And again the Brigadier pretends to exhaust the price of the other parcels of the estate, by virtue of the preferable debts upon these particular parts to which he has right, and which parcels are not affected with Colonel Erskine's debts, whereby the Brigadier gets payment of all, and the Colonel wholly excluded; whereas creditors, by sovereign rights over all, affecting any particular part which stand affected with other less preferable diligences, the posterior creditors are entitled to obtain assignations to such sovereign rights, that they may recover out of one part of the estate what they lose in another.

It was *answered* for the Brigadier; That every creditor is allowed to make the best use he can of his debts and diligences for obtaining his payment, providing it be without emulation of his co-creditor; and therefore it is, that a creditor, having a sovereign right over all, cannot *in emulationem* burden any part, to the exclusion of a creditor who has a particular interest in that part, if the posterior creditor be willing to purge and take an assignation to the debt; but, if the preferable creditor upon the whole subject have also other rights upon parts of it, he will not be obliged to assign in his own prejudice, but with a quality that his assignation shall not be made use of to affect the separate subject upon which he hath other rights; for that would be directly to assign against himself. And that is directly the Brigadier's case; for, by some rights and diligences, he is preferable upon the whole subject; and other rights of his

do only affect particular parts. If he should take the value of the sovereign rights of the whole head, there would not remain a fund sufficient to pay his other debts affecting parts of the estate only. Whereas, by taking the value of his sovereign right out of such parts as are not affected by his debts, he operates his own payment of all, as far as the price goes. And if, by that method, the Colonel come to be excluded, the Brigadier is sorry the fund falls short. But it is his right to use his preference to the best advantage.

‘THE LORDS found the Brigadier might exhaust the price of any part of the estate by his sovereign rights affecting the whole; and that he might make the best use he could of his rights, providing the same were not acquired or made use of *in æmulationem* of the Colonel.’

Fol. Dic. v. 1. p. 223. Dalrymple, No 140. p. 193.

* * Bruce reports the same case :

THE Brigadier having purchased the lands of Valleyfield, Overtoun, Pitfouly, and others, as highest offerer at the roup, and given bond for the price, presents a bill craving his bond may be given up to him, because he had paid the price to the creditors conform to the decret of ranking. And having also given a scheme of the price and debts, Colonel Erskine, a creditor, gives in this objection against the same, viz. that the Brigadier, by the scheme, laid the whole preferable debts, so as to exhaust the price of Valleyfield, without taking any part of them out of the price of Overtoun and others, upon which these debts are also preferably ranked; and this to the Colonel's prejudice, who is ranked upon Valleyfield, after these preferable creditors, but is not ranked upon Overtoun, &c.

Answered for the Brigadier; That he may use his securities in the most profitable way for himself; nor does thereby any thing in emulation of the Colonel, but only uses his right in a warrantable way, and may draw his full payment out of Valleyfield, without any regard to the Colonel's debt; specially since otherwise the Brigadier would be cut off from the payment of these debts affecting the separate estate, which is untouched by the Colonel's diligence. Whereby it appears, that the Brigadier is not taking this method *in æmulationem*; nor can any creditor give rules to another how he is to use his diligence, since thereof he is *liber moderator et arbiter*.

Replied for the Colonel; That as these preferable debts were a general burden affecting the whole estate, so they affected not one part more than another, and therefore the different parts were, according to their value, to confer their proportions for discharging this common burden; and although the creditor might distress any one part for the whole, yet that did not alter the natural tye on the respective parts for conferring their shares to their joint mutual relief.

No 27. And, in such cases, very often our law, and the Lords practice, order assignments, after the example of the Roman *beneficium cedendarum actionum*.

Duplied for the Brigadier ; That no such assignation was ever ordained to be granted, where there was an evident prejudice thereby to the prior creditor, to the exclusion of his other rights ; as was decided in the ranking of the creditors of the same estate of Valleyfield, betwixt these same parties contending.

THE LORDS found, that the Brigadier may affect the lands of Valleyfield with the debts which are preferable on the whole subject exposed to roup, to the effect he may get payment of his other debts, affecting particular subjects, which he may use to his own best advantage, without emulation to Colonel Erskine.

Bruce, No 88. p. 105.

1716. July 25. SIR WILLIAM MENZIES against SIR JOHN CLERK.

No 28.

A preferable creditor can do no arbitrary deed to prefer one secondary creditor to another.

A DISPOSITION being granted by James Clerk, to his brother Sir John, of his lands of Wrights-houses, but qualified with a back-bond, obliging him to denude in favours of the cedent, so soon as he should relieve him of some debts, all mentioned in the bond in which he already stood engaged for him, and pay him such sums of money as he should happen to be resting to him thereafter, or for which he should be engaged. Some years thereafter, Sir John gets also an heritable bond for security of the same sums mentioned in the back-bond, and some others he then was engaged in for him ; and grants another back-bond, with a clause of reversion much of the tenor of the former, either of which rights he was to be at liberty to make use of as he thought fit, and then gets himself infeft upon both securities in one day. After granting of which rights, but before infeftment thereon, James Clerk became debtor to Sir William Menzies, whereupon he adjudged not only the lands, but the said back-bond and reversion competent to the common debtor, and stands infeft, but posterior to Sir John's infeftment ; and the Lords, in a competition, having ordained Sir John to denude in favours of Sir William upon his purging the above debts, and paying a certain sum in name of expenses, and Sir John having acquired some other debts after Sir William's adjudication, this question came under debate, viz. Whether Sir William should be obliged also to pay these latter debts, (whereupon adjudication had also followed), before Sir John were obliged to denude ?

And here it was *alleged* for Sir John Clerk ; *1mo*, That the foresaid clause (all other sums which James Clerk should be resting to him thereafter) being an express quality and condition of the reversion, he could not be bound to denude till he were also paid of the said posterior debts. *2do*, Sir William having adjudged the back-bond and reversion competent to the common debtor, and

thereby come in his place, he was consequently liable to all his prestations, *tantumquam utens jure auctoris*.

No 28.

Answered for Sir William Menzies, to the *first*; That James Clerk having the right of reversion, and that right being carried from him by the creditors diligence, and thereby stood in their persons, and he denuded, that reversion could never afterwards be burdened without their consent; just as if a man should dispo-
 ne the fee of lands, but with a faculty to burden, if that faculty were adjudged from him, he could never thereafter exerce it in prejudice of the adjudger: For although, before the act 1696, infestments of relief were valid for debts contracted after the date of the infestment, yet not for debts thereafter acquired voluntarily; and therefore the act takes only notice of debts contracted, not of those acquired; and the reason of the difference is, that, by borrowing, the reverser consents that the lands be further burdened, but the acquiring is only a deed of the creditors; and, if it were otherways, it were in the power of Sir John Clerk to alter the preference, and to make those debts, which were once posterior, to become preferable, which no diligence could prevent; whereas creditors, by inhibiting, can prevent further contracting. To the *2d*, That, if the creditors are in the same case with James Clerk, then they are in the same case he was in at the time they denuded him of the reversion by their diligences; and so no burden brought upon the reversion after their diligence can be effectual without their consent.

Replied for Sir John Clerk; *imo*, That it is not absurd Sir John should have it in his power to prefer one creditor to another, since, if he had not granted the back-bond to the common debtor, the competitor's author, the said competitor's diligence could never have affected the subject; besides, that there are many cases where debts, that are not so much as really secured, are yet preferable to other debts whereupon adjudication has followed, as particularly in the case of Sir John's own expenses, modified already in this cause, which are found to be a condition affecting the reversion, and that Sir John is not obliged to denude till these expenses be paid.

Duplied for Sir William Menzies; *imo*, That the expenses is quite another case, because particularly expressed in the back-bond, but not one word of debts afterwards to be acquired. *2do*, The expenses were a kind of accessory of the debt, and came in place of the penalties. *3tio*, The Lords have decided this matter already in several parallel cases; 17th July 1706, Sir Hugh Campbell against the Creditors of Park, *voce PERSONAL AND REAL*; and 19th January 1715, the Creditors of Hackburn competing. No 210, p. 1153.

“THE LORDS found, That, after James Clerk's creditors had adjudged any right competent to him, Sir John Clerk could not acquire any right due by him in prejudice of the adjudgers.”

For Sir John-Clerk, *Grey*.

Alt. Robert Dundas.

Clerk, Sir James Justice.

Fol. Dic. v. 1. p. 222. Bruce, No 24. p. 31.

19 L 2

1727. February 17.

SOUTH DUN, and the other personal Creditors of SIR WILLIAM KEITH of Ludquhairn; and LADY KEITH of Ludquhairn, *against* SINCLAIR, &c.

No 29.

A wife consenting to infestments of annualrent upon her jointure-lands, the annualrenters, after drawing their payment, must assign her to any other subject in which they are infest, in order to relieve her of what she suffered, by yielding them the preference.

By a charter from the Earl of Marshall, several lands are disposed to Sir William Keith, particularly the lands of Boddom, in conjunct fee and liferent, with Dame Jean Smith his wife, for her liferent use of the said lands of Boddom, whereupon Sir William and his Lady are infest 1692. Some time thereafter Sir William contracted great debts, and granted heritable bonds upon the lands of Boddom, with consent of his Lady, 'For all right, title, and interest of conjunct-fee and liferent, she had out of the said lands.' After Sir William's decease, the creditors came into a ranking, where the annualrenters were preferred to the Lady by virtue of her consent; but the Lady insisted, that in so far as she or the factor (the estate being sequestered) should make payment to these annualrenters, out of that fund in which she was truly preferable, she ought to be assigned by them to so much of the annualrents, in order to operate her preference in the price of the estate, preferable to the personal creditors, who had done diligence by adjudication, so as to recover the full value of her liferent.

This was opposed by the creditors adjudgers, who *contended*, *imo*, That the Lady's consent to the annualrenters' preference was *simple* and *absolute*; that she could have no recourse against her husband's heirs, for what she suffered by consenting to these annualrents, far less against his creditors. Indeed where a relict is infest in an *annuity* out of lands, *quæ afficit unamquamque glebam*, and has consented to heritable debts, which may restrict her annuity, it is a question if she may not, in so far as the annuity is restricted, bring the deficiency or inlakes to be a real burden upon the ground, in the same manner, as if the subject out of which her annuity was constituted, had not been originally of the extent of the annuity; but, in the case of a liferent *locality*, which of its own kind is a right of property, the wife's concurrence and consent with the husband, in alienating the subject, must as much restrict and diminish her right in the subject, as the husband's estate is diminished and restricted by an alienation apart. And in so far as the creditors can discover, it never was made a question, but if the wife had consented with the husband in an absolute disposition of a part of these lands, over which her liferent-locality was constituted, her liferent would thereby be restricted *pro tanto* of the alienation, without a possibility for her to recover any sum of money equivalent to the right renounced. If this holds in absolute alienations, there is no reason why it should not likewise hold in infestments of annualrent; and therefore, in the present case, the Lady's consent can afford her no recourse against her husband or his creditors, whether directly upon pretence of eviction, or indirectly, by obliging the annualrenters to assign.

Answered for the Lady; *Donatio nunquam præsumitur*; when a wife consents to the alienating or burdening her life-tenements, to assist her husband in his necessities; there is no presumption that she designs *absolutely* to give away, more than if she had granted life-tenement in her own heritage for her husband's debts. These, all of them are of the nature of *cautionary* engagements, implying a *recourse* for *recompense*, from the very nature of the thing.

The Creditors *pleaded*, in the *second* place, There is no obligation upon the annualrenters, upon drawing their payment, to assign to the Lady; and supposing their voluntary concurrence, the law stands in their way, which hinders preferable creditors, by arbitrarily granting assignments, to prefer one subaltern life-tenement to another. These annualrenters have a preference, both upon the fee and the Lady's life-tenement of the lands of Boddum; they cannot arbitrarily burden either of these subjects, but if they draw their whole share out of one, must assign proportionally against the other; so that, upon the event, each may be burdened in proportion to his subject. If, therefore, the annualrenters grant assignment of their annualrent-rights to the Lady, it can only be proportionally, not for the whole.

To which it was *answered*; The present case is not that of two life-tenements, in two different subjects, and a preferable catholic life-tenement over all; the Lady notwithstanding her consent, by the priority of diligence is still preferable; if there is a private paction betwixt her and the annualrenters, that has no effect but betwixt themselves, and can never produce a *jus quæsitum* to the adjudgers, as if the annualrenters had a catholic preferable life-tenement. *2do*, Allowing the consent gave an *ipso jure* preference to the annualrenters, which the adjudgers could plead upon, it would avail them nothing in this case; for here the annualrenters stand bound in an implied obligation, to assign to the life-tenentrix upon payment; which obligation is also inferred, from the nature of the cautionary engagement. The Lady impledged her life-tenement lands for her husband's debts; or, which comes to the same, she consented to the creditors preference in these lands, for their security and payment; it is not conceivable, but in this transaction she designed herself a relief, as far as was consistent with the preference of these creditors, whose security was in view; and to this relief the creditors, who reap the benefit of her funds, are bound *ex bono et æquo* to contribute, as far as is consistent with their own interest. 'Hence arises the obligation upon creditors, 'in all transactions, where one person intervenes for another, cautionary or the 'like, to assign upon payment, to the person intervening, for his relief.' If now the annualrenters became implicitly bound, upon the life-tenentrix her consenting to their preference, to give her assignments for her relief; when they fulfil their engagements, and the assignments are granted, there is nothing like an arbitrary preference of one subaltern life-tenement to another; if the adjudgers plead upon the consent, they must take it with its implied condition, *sciz.* the obligation upon the annualrenters to assign; and they have no sort of reason to repine, since they are not in a worse case than if the consent had not intervened.

No 29.

It was *pleaded* in the *last* place, There are no *termini habiles* here for an assignation; for, in so far as the factor shall make payment to the annualrenters, the annualrent-rights are in so far extinguished, without a possibility of being assigned.

Answered; The sums paid by the factor to the annualrenters, do properly belong to the liferentrix, which indeed by paction she is bound to communicate to them; but if they go about to uplift as in their own rights, her liferent right stands in the way; and if they again offer to subsume upon her consent, the answer will be, that the consent establishes not the annualrenters in an *ipso jure* preference, it means no more, than if the liferentrix had obliged herself to communicate to the annualrenters what she should uplift by virtue of her preferable right, till they were satisfied and paid; or more compendiously, allowed them in her name to intromit; which intromission can never operate an *ipso jure* extinction of the annualrent-rights, since these rights are not the title of the intromission, but a power derived from another; much less will the factor's payments operate an extinction, for the factor pays in name of the Lady; and payments in this shape are of the nature of cautionary payments, upon which assignation is always competent; therefore, as from the nature of the transaction, the creditors are involved in a reciprocal obligation of assigning to the liferentrix upon payment, she is well entitled, both in strict law and equity, to stand in the way of their intromissions or payment, unless they will perform their part, by granting assignations.

'THE LORDS, in regard both the heritable creditors and the Lady (supposing she had given no consent to their preference) would have been preferable to the other creditors, found, that in so far as the creditors, to whose rights the Lady is consenter, prejudice and hinder her to draw her full provision out of the subject and price thereof, that she is preferable to the hail other creditors, to whose rights she is not consenting, because of the priority of her infestment, for the deficiency of the said liferent provision.'

Here the preference was directly granted, without the circuit of an assignation, according to the rule, 'That in competitions every right is held as made up, which actually made up would found a preference.'

Fol. Dic. v. 1. p. 226. Rem. Dec. v. 1. No 94. p. 185.

1729. *January.*

CREDITORS of *RUSCO* against *RELICT* and *CHILDREN* of *BLAIR* of *Borgue*.

No 30.
A preferable
creditor, in
particular cir-
cumstances,
found not
bound to
assign.

In the year 1685, *McGuffock* of *Rusco*, heritor of the lands of *Borgue*, granted an heritable bond for the sum of L. 2000 out of the said lands, in favour of *Irvine* of *Logan*, whereupon the creditor was infest the same year. Thereafter, the said *Rusco* granted a disposition of the lands of *Borgue* in

No 30.

favour of his second son David Blair, reserving a faculty to alter, but which faculty he afterwards renounced in his son's contract of marriage. McGuffock of Rusco being overcharged with debt, his estate, in the year 1727, was brought to a sale, and the said Irvine of Logan, who had adjudged all his debtor's lands for the above-mentioned debt of L. 2000, was ranked as a preferable creditor; and, upon his drawing payment, it was demanded by the other creditors, that he should assign them to his infestment upon the lands of Borgue. This was opposed by the relict and children of Borgue, upon this medium, That by Rusco's disposition to his second son, and after consent in that son's contract of marriage, he became bound to warrant the said lands, the consequence whereof was, that had Irvine of Logan drawn his whole sum out of their lands, they must have been entitled to demand assignation against Rusco, bound to them in warrandice.—*Answered*, Rusco was never bound to warrant against Logan's debt; the disposition was under a reserved faculty to contract debt, alter, and dispose of the estate, &c.; and supposing the son had paid the debt, he could never have distressed his father for the same; and consequently, an assignation would have been fruitless and ineffectual; nor did the father's after consent in his son's contract of marriage, which implied a renunciation of his faculty, alter the case: For this would not be drawn to import an obligation upon the father to warrant or relieve his son of the foresaid debt.—THE LORDS refused the assignation.

Fol. Dic. v. 1. p. 224.

1729. June 13. MR HENRY RAMSAY *against* The BANK of SCOTLAND.

A CREDITOR, ranked in the second place, did, after the ranking, purchase in the preferable debt, and having these two rights in his person, he became purchaser of the estate at a public sale, and gave bond for the price, payable to the creditors as they were ranked; the preferable debt purchased in by him, as said is, did not only reach over the lands purchased by him at the public roup, but also over a separate subject belonging to another. The fact was, that the price of the lands, sold publicly, was but sufficient to answer the preferable right; and therefore, the purchaser, willing to bring his secondary claim within the price, craved payment of his preferable right, entirely out of the separate subject; which the LORDS refused, and found, That the said debt, being in the person of the purchaser of the lands, upon which it was ranked *primo loco*, which purchaser granted bond for payment of the price to the creditors as ranked, the said debt became *eo ipso* extinguished *confusione*, and could not revive to be a charge upon the separate subject. See APPENDIX.

Fol. Dic. v. 1. p. 224.

No 31.

A purchaser of an estate who had purchased a preferable debt, affecting both that estate and another, was found to have no claim on the separate estate, but that the debt was extinguished *confusione*.

No 32.

An assignee, in particular circumstances, found not obliged to assign in prejudice of an arrestment.

1730. June 12.

ROBERTSON *against* BLAIR.

MRS DALGLIESH, creditor to the Earl of Roseberry, arrested the rents of his estate in the tenants hands, as also a personal bond of his, in the hands of Alves the debtor; thereafter the same rents were arrested by Blair, another creditor, who, by decret of furthcoming, was preferred *secundo loco* on that subject; last of all, the common debtor granted assignation of Alves, his bond, for onerous causes to Robertson; the debtor in the bond raised a multiplepinding, wherein the arrester was preferred to the assignee. Robertson the assignee, whose subject was thus carried away by Mrs Dalglish the arrester, demanded an assignation to the arrester's debts and diligence, in order to operate his relief out of the other subject affected thereby, *sciz.* the rents of the estate in the tenants hands.—Against this demand, Blair, the second arrester of that subject, appeared for his interest; it was *pleaded* for him, That he could not be prejudged by the common debtor's assigning to Robertson.—It was *answered*, That the common debtor remained *fiar* of the bond, just as much after Blair's arrestment as before, the arrestment not affecting the bond; and therefore, his assignation to Robertson was valid and effectual in law, and did infer an obligation upon the catholic creditor, chusing to draw his payment out of a fund that now no longer belonged to his debtor, to assign for a total relief.—*Replied* for Blair, That the bond being affected by the preferable arrestment, was made litigious; and, therefore, still to be considered as remaining in the person of the common debtor.—THE LORDS found, That Mrs Dalglish was not obliged to assign to the assignee Robertson, in prejudice of Blair's arrestment. See APPENDIX.

Fol. Dic. v. 1. p. 225.

No 33.

Whether, in particular circumstances, a party was bound to assign an inhibition upon payment.

1730. November 12. JOHNSTON *against* SUITTIE.

GEORGE GORDON lent 1000 merks upon bond, conjunctly and severally to Kincaid and Suittie. Kincaid got the money, and gave Suittie a bond of relief; upon this bond, after the term of payment, diligence was done by horning and inhibition. Thereafter Kincaid, Suittie, and Johnston, conjunctly and severally, granted bond of corroboration, containing a clause, obliging the other two to relieve Johnston as their cautioner. Johnston after this, and after existence of the inhibition, lent Kincaid, the common debtor, L. 100 Sterling by an heritable bond. Last of all, the said Johnston paid the debt wherein he was cautioner, and took from Gordon, the creditor, assignation to the debt and diligence, and insisted against Suittie for relief. In this process the question occurred, Whether Johnston was bound to assign the inhibition to Suittie, upon payment.—Johnston *pleaded*, That the inhibition striking against his heritable bond, the law did not oblige him to assign against himself.—Suittie *contended*, That this rule holds not betwixt cautioners, who, seeking relief of one another,

are bound in strict law, from the nature of the contract, to assign.—THE LORDS found no necessity upon Johnston to assign the inhibition. See APPENDIX.

Fol. Dic. v. 1. p. 225.

No 33.

1771. November 19.

WILLIAM GARDINER of Ladykirk, and JOHN CAMPBELL of Wellwood, Suspenders, against ROBERT AGNEW of Sheuchan, Charger.

MESSRS Gardiner, Campbell, and William Donald, were co-obligants in a bond for L. 1200 to Robert Agnew. Donald having become bankrupt, Gardiner, upon the 11th June 1770, went to Agnew's house at Stranraer, and having offered instantly to pay down the L. 1200 with the interest due, insisted he should accept it, and grant an assignation of the bond, to enable them to operate their relief for Donald's proportion of the debt.

Agnew at first stated objections to receiving the money between terms; yet at length said he was willing to take payment, giving up the bond with a discharge on the back, but would not grant an assignation.

Donald's effects having been carried off by other creditors, Messrs Gardiner and Campbell, upon the ground that they had been prevented from operating their relief against Donald their debtor, by the tortious act of Agnew in refusing to grant an assignation, presented a bill of suspension; which, after setting forth the *res gesta*, and that they were threatened to be charged with the whole debt, insisted that the charge should be suspended *quoad* a third.

The question having been reported to the Court,

Messrs Gardiner and Campbell, the suspenders, *pleaded*;

Imo, It was now an established point in law, whatever it might have been formerly, that a creditor, upon receiving payment from one of several co-obligants, whether cautioners or principals, was bound, for their relief, to assign the debt. Principles of Equity, v. 1. p. 114. 126.; Bankton, v. 1. p. 23.; Ibid. b. 1. tit. 24. § 2.; b. 3. tit. 4. § 8.; Spottiswood's Stiles, p. 212. 249. 511.

Upon some occasions, in the last century, before the law on this point had come to maturity, it had been found that creditors were not obliged to assign. Stair, 10th July 1666, Home, No 4. p. 3347.; Fountainhall, 31st December 1697, Rae, No 12. p. 3356. Yet even then, the obligation to assign had, in some instances, been enforced; Stair, 10th January 1665, Lessly *contra* Gray, No 37. p. 2111.; 15th July 1680, Anderson, No 10. p. 3354.; 25th November 1708, Adamson *contra* Lord Balmerino, No 15. p. 3359.; 19th December 1705, Reid *contra* Man, No 23. p. 3368. In the case, Blackwood against

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No 34.

Is a creditor bound *de jure* to assign his ground of debt to a co-obligant, who, without having been called upon, before the term of payment, and in particular and unusual circumstances, tendered him payment of his bond? And is such creditor, for having refused to assign, liable in damages to the co-obligant?

No 34.

Miln's Creditors, &c., No 47. p. 3396., where the point occurred incidentally, the Court ordained the creditor to assign; and a similar judgment in principle was given, 4th March 1757, Maule *contra* Graham, *voce* DILIGENCE.

Instances of assignments of this nature occurred every day in rankings and other competitions of creditors; where a catholic creditor, who chose to take his payment out of one particular subject, was obliged to assign to a secondary creditor who may have affected that subject, and who would otherwise be cut out,—a rule clearly derived from analogy to that maintained in the present instance. An assignation of this nature was a necessary extrajudicial deed; and the question admitted of no distinction, whether the payment had been forced by diligence, or was voluntary; more especially as, in the present case, owing to the bankruptcy of the co-obligant, it was at all events a *necessary* one. L. 17. ff. de Fidejuss.; L. 11. Cod. de Fidejuss.; 21st December 1710, Pitcairn, No. 25. p. 3371.; Erskine, b. 2. tit. 11. § 8.

2do, As the suspenders were therefore entitled *de jure* to demand an assignation to the bond, the consequences of the charger's refusal could not admit of a doubt. It was a fixed principle, that wherever a creditor directly or indirectly took any step, by which the relief of the cautioner was either destroyed or diminished, he *eo ipso* was bound to relieve him of his obligation to that extent. 27th July 1708, Creditors of Nicolson *contra* Earl of Balcarras, No 14. p. 3357.; 25th January 1717, Wallace *contra* Lord Elibank, No 38. p. 3389.

Mr Agnew, the charger, *answered*;

1mo, The argument, with respect to cautioners being entitled to assignment of any security in the person of the creditor, did not apply to the present case. An assignment was, no doubt, in some cases, demanded as a matter of right, viz. where collateral or separate securities were to be conveyed; but not where the purpose was only to convey a right already competent *de jure*, and which might be rendered effectual by a process at law. Such was the situation of a cautioner, who, although he had no bond of relief, was enabled, by an action against the debtor, to make his relief effectual; and as an assignment was not necessary, except to save him the trouble of an action, there was no principle or reason why he should be entitled *de jure* to exact it. Stair, 10th July 1666, Home, No 4. p. 3347.; Fountainhall, 31st December 1697, Rae *contra* Panton, No 12. p. 3356.; 12th December 1695, Wood, No 11. p. 3355.

Two or more obligants, bound in a bond as principals, conjunctly and severally, were precisely on the same footing as cautioners. If one paid the debt, he had no occasion for an assignation against the rest; for, *de jure*, he was entitled to relief of them *pro rata*, No 4. p. 3347.

2do, The present case was more unfavourable than any that could well be figured. The charger had not applied for payment of the bond, nor did he even expect or wish it to be paid; on the contrary, the suspenders had pressed the

money upon him at a most unreasonable time, under their own conditions; and, as it could not be said that he had distressed them for payment, there was no claim of relief which they had to operate.

As the money had been tendered without distress, it was natural, and the charger was entitled to presume that it belonged to all the three co-obligants, and that the purpose of making the payment was to extinguish the debt. In this situation, accordingly, as there might not have been an equitable claim in existence to be relieved from, the charger would have been to blame, had he put into their hands an engine to distress, and perhaps to ruin, the credit of this third obligant.

As the charger therefore had not been *in culpa*, the consequences, whatever they may have been, could not be imputed to him; and the suspenders were themselves to blame in not having taken a bond of relief from their co-obligant; which would enable them to act with whatever diligence they should think necessary.

The Judges were a good deal divided upon this question. Several maintained, That a creditor was obliged to grant an assignation *de jure*; while others held it could only be demanded *ex equitate*. The majority, however, were of opinion, That the charger had not acted improperly; and as the demand made on him rested only upon equitable considerations, it would have been oppressive to punish him for an innocent mistake in law. The circumstances also, in which the demand had been made, were so uncommon, that it was not surprising he should have hesitated; and, in particular, that the suspenders were not entitled to favour, as, by not taking a bond of relief from Donald, they had been themselves to blame.

They accordingly, 19th November 1771, 'repelled the reasons of suspension, and found the letters orderly proceeded.' And thereafter, a reclaiming petition, without answers, was refused.

Lord Ordinary, *Auchinleck*.
For Agnew, *Ilay Campbell*.

For Gardiner and Campbell, *Wight, Geo. Fergusson*.
Clerk, *Tait*.

R. H.

Fac. Col. No 108. p. 325.

S E C T. III.

A Creditor receiving payment from a Cautioner, must assign every separate security for the debt. By passing from his separate security he liberates the Cautioner.

No 35.

1628. July 4. HAMILTON *against* BISHOP of GALLOWAY'S RELICT.

A CAUTIONER in a contract of marriage, being pursued by the relict, her claim was found compensated and extinguished by the sums and goods she had confirmed in her husband's testament; and that although diverse of them were evicted from her by sentences at the instance of his creditors; in regard she was entitled to have pleaded a preference to the creditors upon her contract of marriage, and neglected to do it.

Fol. Dic. v. 1. p. 226. Duric.

*** See This case, No 19. p. 2087.

No 36.

1665. January 10. LESLIE *against* GRAY.

A creditor getting payment from a cautioner, was not only obliged to assign him for his relief against the principal, but likewise was decerned to convey to him a separate security which he had obtained *ex post facto* for the same debt.

Fol. Dic. v. 1. p. 227. Stair.

*** See This case, No 37. p. 2111.

No 37.

1677. June 24. MR WILLIAM ROBERTSON *against* CAMPBELL of Kilpount.

There was a clause in a wadset, that if the wadsetter should take possession, both principal and cautioner should be free of annualrent during his possession. The wadsetter, after being several years in possession, voluntarily quitted it,

Mr Archibald Campbell being pursued at Robertson's instance, as cautioner in a contract of wadset for the Master of Gray for 50,000 merks, in case of requisition; in which wadset there was a clause, That if he should continue in possession of the lands, that the principal and cautioner should be free of annualrent;—the said Mr William having desisted to possess, and suffered the Laird of Philorth to enter to the possession, who had required a right of reversion, did pursue for the principal sum due by the requisition, and for five years annualrent that he had been out of possession.—It was *alleged*, That the pursuer having continued in possession after the requisition, and thereafter desisted without any decret gotten against him at Philorth's instance, he could not pursue for payment.—It was *replied*, That by the foresaid clause of wadset, it was in the pursuer's option to possess or not possess as he pleased, so that

he might desist and seek the annualrent of his money.—THE LORDS did sustain the pursuit for the principal sum and annualrent in time coming, the pursuer denuding himself of the right of wadset in favour of the defender, who was only cautioner. But as to the years that he had suffered Philorth to possess, the defender was assoilzied, seeing he had never used an order of redemption, but had possessed by the pursuer's tolerance or right.

Fol. Dic. v. 1. p. 226. Gosford, MS. p. 120.

No 37.
without any intimation made to the cautioner. The cautioner was found liable for annualrent in time coming, from the date of the process, but not for by-gones.

1717. January 25.

HUGH WALLACE of Inglistoun *against* The LORD ELIBANK.

THE LORD ELIBANK being charged as cautioner for John Auchmouttie, he suspended on this reason, That Murray of Spot was also bound for the same debt, and the charger having denounced him, did afterwards consent to his relaxation; and the gift of Spot's escheat being taken upon several hornings, whereof the charger's was one, the charger did insist for payment of the debt in the horning, out of the escheat goods, and was excluded in that pursuit by the consent he had given to the rebel's relaxation; whereby my Lord Elibank was prejudged of the relief that was competent to him against Spot; for, if the charger had not consented to the relaxation, the half of the debt would have been paid by Spot's escheat goods, and the suspender has paid the other half, and therefore the letters ought to be suspended.

It was *answered*; The creditor takes cautioners one or more for his own security, and he may do diligence, or forbear it, or discharge it, when it is done, at his pleasure, which a co-cautioner cannot quarrel.

It was *replied*; If the creditor have more cautioners, and should discharge one of them, the co-cautioner would be liberated from that share, to which the co-cautioner discharged, would be liable to relieve the other cautioners; because a cautioner paying has the *beneficium cedendarum actionum*. And if the principal have done any deed to make the relief ineffectual, either by discharging a co-cautioner, or, which is the same thing, by passing from any diligence which would have operated his payment, and the other co-cautioner's relief, he is obliged to make up the damage to the co-cautioner; and in this case, Spot's escheat would effectually have operated the charger's payment.

THE LORDS found the charger liable to make up the damage sustained by the suspender, by consenting to relax Spot the co-cautioner.

Nota, That Spot was not bound in the original bond, but only in a corroboration; in which they varied from what was found in a like case, Clerkson *contra* Edgar, *voce* SOLIDUM ET PRO RATA.; and 14th February 1705, Brock

No 38.
A cautioner cannot arbitrarily discharge his diligence done against one *co-reus debendi*, to the hurt of the rest, who have a right to claim assiguation.

No 38. *contra* the Lord Bargainy, *IBID.* ; but there were decisions on the other side also condescended on ; so that there is no fixed rule in this point.

Fol. Dic. v. 1. p. 226. Dalrymple, No 167. p. 231.

No 29. *January 21.* M'MILLAN *against* HAMILTON of Oliverstob.

No 39.

A CREDITOR having apprehended the principal debtor upon a caption, and kept him some days in the messenger's hands, and thereafter set him at liberty ; this was not found sufficient to liberate the cautioner. It was yielded that a creditor can pass from no consummate diligence or security to disappoint the cautioner's relief, but he may begin, without being obliged to finish any diligence : Thus, though he may take out a horning, he is not bound to charge or denounce, or take out a caption, or put that caption in execution ; and if there were not a discretionary power left to the creditor, it would be the occasion of most unmerciful distress ; neither is there any thing more usual than for the creditor to stop when the messenger has touched the party, and to take a bond of presentation, or such other security as he can obtain. *See APPENDIX.*

Fol. Dic. v. 1. p. 226.

* * The like was decided in a case, *Grahams against Little*, 16th July 1730.
See APPENDIX.

No 40.

A cautioner can reap no benefit from a separate security unless conveyed to him.

1735. *February.* GARDEN of Troup *against* DR GREGORY.

A CREDITOR of a tenant's having arrested corns belonging to his debtor in a third party's hand, a cautioner in the tack, who had been forced to pay the tack-duty to the setter's creditors, appeared in the furthcoming, and *pleaded* preference upon the right of hypothec.—*Answered*, The right of hypothec was extinct by payment of the rent, the cautioner having demanded no assignation of the same from the setter.—*Replied*, What a party is bound to do, the law holds as done. Here the tack-duty was drawn out of the cautioner's hands by the setter's creditors ; so that there was no opportunity to demand assignation from the master ; the law supplies this, and the cautioner pleads upon his legal assignation.—THE LORDS preferred the arrester, in respect the cautioner had not an actual assignation from the setter to the tack-duty and hypothec. *See APPENDIX.*

Fol. Dic. v. 1. p. 227.

S E C T. IV.

One entitled to relief getting an ease upon payment, can claim no more than the transacted sum.

1639. February 9. HAMILTON of Broomhill *against* LAWDER.

ONE Lawder being debtor to sundry of his creditors, in divers sums of money, and to Broomhill's self, in a little sum, which he had paid for Lawder, as his cautioner; the right of all which sums being acquired from Lawder's creditors by Broomhill, he upon assignation of these debts, and for his own, comprises Lawder's lands; which comprising being near at expiring, Lawder intends an action for compt, reckoning, and payment against Broomhill, that after count he may be satisfied of his just sums, and so the said lands may be declared freed of that comprising; in this action it being controverted as Lawder alleged, that he ought to be subjected to pay no further sums, but such only as were debursed really by Broomhill to his creditors for their rights; for seeing he had unnecessarily bought these sums, and the rights thereof, from his creditors, and had needlessly and unkindly come in betwixt him and creditors, with whom he might have transacted upon more easy conditions, it were no reason that there-through he should take advantage, beyond that which he really and truly debursed, seeing he was content to pay him what he had truly paid therefor, with the annualrent thereof, ever since the time of his debursing. THE LORDS found, that they could not in law compel Broomhill to receive no more than he paid to the creditors; for if they had disposed their debts to him for never so little a sum, or had gifted the same to him for nothing, the assignee could not be urged but at his own pleasure, to remit any part of that which was a just debt owing to the cedent. And it being also controverted, if Broomhill should be comptable for the mails and duties of such part of the comprised lands, as were tenant-stead; and occupied by tenants, the time of the comprising, and thereafter were given over by the tenants, and lay waste; seeing Broomhill alleged, that by the act of parliament 1621, anent comprisings, the compriser is not holden to count for any more profits of the lands, than wherewith he actually intromitted, and is not comptable for any thing wherewith he may intromit, far less can he be comptable for that which was waste, not in his default, but by the tenants over-giving and deserting the room;—THE LORDS found, that seeing, after the comprising, the room was laboured by tenants, who had a tack of endurance of more years than these years controverted, and standing yet unexpired; that the laying waste of the rooms, and giving over of it by the tenant, ought not to prejudice the debtor, but that the compriser ought to be comptable therefor, seeing after the over-giving, he ought either to have laboured the room, or set it to some other tenant, to the best advantage he

No 41.

A party *tanquam quilibet* buying debts, is not bound to communicate the cases to the debtor.

might, and done therein, as *bonus pater-familias fecisset in re sua*, or else he should have made some intimation to the debtor, and required him to provide for the room, and given way to him to make use of it, for his best profit, if the compriser had not been willing to make use of it himself;—but doing no diligence to make profit of the land, in these years when it was waste; the LORDS found, that notwithstanding of the act of parliament, which met not this case, the compriser remained comptable.

Act. *Mowat & Sandilands.*

Alt. *Hamilton.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 227. Durie, p. 874.

1662. February 4. LAIRD OF ELPHINSTONE against SIR MUNGO MURRAY.

No 42.

The seller was obliged to relieve the purchaser of the composition for his entry to the lands. It was found that the purchaser could have no claim, if the composition was remitted to him by the superior, although he got it for other good services.

THE laird of Elphinstone having charged Sir Mungo Murray, for the price of some lands bought from him, he suspends, and *alleges*, that by the disposition the charger is obliged to relieve him, of all inhibitions; and now produces several inhibitions. The charger *answered, non relevat*, unless there were a distress, seeing the disposition bears not to purge but only to relieve, or to warrant against inhibitions.

THE LORDS considering that the charger *vergebat ad inopiam*, found the reasons relevant, till caution were found to warrant the suspender from these inhibitions. They found also, that where the charger was obliged to pay to the suspender, the composition for his entry to the lands; that the suspender should have no composition if he got it *gratis*; albeit he alleged he got it for other good services.

Fol. Dic. v. 1. p. 227. Stair, v. 1. p. 91.

1664. July 8.

NISBET against LESLY.

No 43.

A cautioner transacted a debt for a lesser sum, and obtained assignation. The Lords found his co-cautioner was bound to relieve him of the half of the whole debt.

JOHN NISBET as assignee constitute by Major Drummond, charges Lauchlan Lesly to pay four dollars for each soldier of sixty, conform to a contract betwixt Major Drummond and Lodovic Lesly, for whom Lauchlan was cautioner. Lauchlan suspends on this reason, that the charge is to the behoof of Francis Arneil, who was conjunct cautioner, and bound for mutual relief, and therefore he can ask no more than his share of what he truly paid in composition. The charger *answered*, that he nor Francis Arneil, were not charging on the clause of relief, but on the principal contract, as assignee; and though he had gotten assignation thereto *gratis*, he might crave the same, except his own part,

Which THE LORDS found relevant.

Fol. Dic. v. 1. p. 227. Stair, v. 1. p. 211.

1672. July 27.

BRODIE against KEITH.

THE laird of Innes and Alexander Keith being co-cautioners in a bond, Innes being distressed, did pay the whole sum, and took an assignation to the bond, blank in the assignee's name, which he filled up with the name of Joseph Brodie; who having charged the said Alexander Keith, he suspended upon this reason, that the charge was to the behoof of the Laird of Innes, who being co-cautioner, was obliged to relieve the suspender of the one half. It was *answered* for the charger; that he was content to restrict the charge to the one-half of the sum contained in the bond. It was *replied* for the suspender; that the one co-cautioner, albeit assignee, could not distress the other co cautioner further than for a proportionable part of his own true distress, of what he really paid; for, as in warrandice, how ample soever, recourse is only effectual for the true distress; so likewise it ought to be betwixt co-cautioners by the clause of relief, which is a mutual warrandice. The charger *duplied*, that the creditor might have gifted to him the whole sum, which ought not to be profitable to any other. The suspender *triplied*, that there is no donation, but the debt being very old, and doubtful whether it was paid by the principal, there was a transaction by the one cautioner for a lesser sum.

Which THE LORDS found relevant, and restricted the charge to the one half of the sum agreed for, and paid by Innes.

Fol. Dic. v. 1. p. 227. Stair, v. 2. p. III.

No 44.

A cautioner transacted an old debt for a less sum, and took assignation in a third party's name for his behoof. That party was found entitled to no more, than the share of what was truly paid.

1702. February 6. HALIBURTON against HALIBURTON.

HALIBURTON of Fodderance, having been cautioner for the deceased Haliburton of Pitcur, to one Paton, in the sum of 2000 merks, and Pitcur being forfeited, Fodderance pays the debt, and takes an assignation, and thereon pursues this Pitcur, as representing on the passive titles. *Alleged*, You must declare *quo titulo* you pursue; for if it be *qua* assignee, then no process can be sustained at your instance, because the bond assigned to you being heritable, it bears a clause of requisition on forty days, which has not been used; and if you insist as cautioner, then you cannot have the whole, because I offer to prove you got an ease, whereof I must have the benefit, for you can exact no more than you gave. *Answered*, He is not obliged to declare nor elect, but may use any of his titles as he sees them most convenient for him; for he pursues here *tanquam quilibet et emptor nominis*, and neither as cautioner nor *negotiorum gestor*: And though he insisted as cautioner, it has been found that a co cautioner taking assignation, though he got an abatement, yet he was not bound to communicate the benefit thereof to the cautioner, as Stair observes, 8th July 1664; Nisbet *contra* Leslie, No 43. p. 3392.; and 7th February 1665, Kincaid and

No 45.

A cautioner upon paying a debt obtained an ease from the creditor. The Lords inclined to think he ought to communicate the cases he got, yet they allowed him to be further heard.

No 45.

Leckie, No 48. p. 2118., marked by President Gilmour. *Replied*, That the contrary has been found in a co-cautioner taking assignation, and recurring against the other cautioner, that he could acclaim no more from him than what he had paid out, 27th July 1672, Brodie *contra* Keith, No 44. p. 3393.; and therefore *a paritate rationis* the same ought to hold in a cautioner taking assignation against the principal. THE LORDS found he ought to declare and elect his title, and if he insisted under the reduplication as assignee, he behoved first to use requisition; and that the raising this process was not equipollent thereto, as was contended by Fodderance; and if he pursued as cautioner distressed, though they inclined to think he ought to communicate the eases he got, yet they allowed him to be further heard thereupon.

Fol. Dic. v. 1. p. 227. Fountainball, v. 2. p. 143.

1712: January 23.

GORDON against AGNEW.

No 46.

A procurator fiscal, by the judge's written warrant, poinded goods without a previous charge. He was found liable in damages. The person to whom the damages were found due accepted of a lesser sum, and granted an assignation of the decree; on which the procurator fiscal pursued the judge by whose warrant he acted. The Lords found he could not recur in warrandice for more than he himself paid.

SIR James Agnew of Lochnew, sheriff of Wigton, being informed that one Douglas of Garrary had cut and carried away some trees, he caused William Gordon of Balmeg, his procurator fiscal, indict him for theft and cutting of green wood; and by his decret finned him in 200 merks; and of the same date he gives Balmeg an order to this purpose, 'Fail not on sight to go and secure so much of Douglas's goods as will pay the 200 merks of fine, and dispose of them according to my order given you this day; and thir presents shall be your warrant.' In obedience to this order, the procurator fiscal, without getting any precept on the decret, or biding till the days of the charge were run, poinded twelve or thirteen nolt of Douglas's, and brought them to the sheriff, who disposed on them. This execution being so summary and contrary to law, Douglas pursues Balmeg for a spuilzie before the Lords; and referring the fact to his oath, which he could not deny, he is decerned in the value, and the violent profits, amounting to a vast sum; and being distressed is forced to transact; and taking an assignation, he raises a process against Sir James Agnew the sheriff, for refunding his damages, in respect that what he did was by his warrant. *Alleged, 1mo*, The warrant is null, as wanting the writer's name and witnesses. *Answered*, Custom, the best interpreter of laws, has sufficiently explained this, that warrants and sentences of judges require no such solemnities, the character and authority of the judge and clerk supporting these deeds without any other formality. *2do, Alleged*, The warrant relates to another order given him of the same date, and so cannot oblige till that be produced; for it might regulate and qualify his procedure. *Answered*, This is a chimerical objection; for he is ready to give his oath that there was no separate order but the decret, and a verbal commission to bring the poind to the sheriff. *3tio, Alleged*, Words are to be taken in a legal sense; so that the warrant to secure

and apprise must be always understood after the days of the charge are elapsed ; for *in ambigua voce ea potius accipienda est interpretatio quæ vitio caret* : l. 19. *D. de legibus* ; and it is founded both in humanity and charity to put the most favourable construction the words will allow, *rapienda est occasio quæ benignius præbet responsum*. *Answered*, There is no room left for such charitable conjectures here ; for it commands him on sight to go and poind, though he knew there was neither precept nor charge given ; so Balmeg obeyed the very letter of the warrant by present poinding, to prevent Douglas's abstracting his beasts. *4to, Alleged*, *Esto* the warrant were taken in the worst sense, yet you ought not to have obeyed it, for wrong has no warrant ; where a warrant is given to commit a delict, the mandatar has no relief nor recourse against the mandant, for the damages he has incurred by performing the same, as is clear *per l. 6. § 3. D. mandati*,—*§ 7. Instit. cod. tit. Rei turpis nullum est mandatum, non est obligatorium quod contra bonos mores fit* : and Voet *ad d. tit.* goes a greater length, though the *mandans promississet indemnitate rei turpis executori in casu quo criminis illius perageretur, non tamen habebit actionem contra mandantem* : And Craig, *L. 2. Dieg. 4. § 11.* is positive *spoliationem nullum habere warrantum ut homines a malificiando deterreantur* : and Stair *lib. 1. tit. 12.* says, a mandate in a thing unlawful, though accepted, yet does not oblige the acceptor to perform it ; and if he executes it, yet it does not bind the mandant to make up his damage. *Answered*, Mandates given by private parties *et in materia privata*, afford no recourse to the mandatar, but it is otherways in judges' and magistrates' warrants, which their apparitors or servants of court are not to examine if legal or not, oppressive or not ; we know mandates of sovereigns or supreme judicatories excuse the obeyers, and why not of inferior judges ? And here the recourse is founded on express paction ; for it bears 'and this shall be your warrant.' It is true, mandates to commit crimes against the light of nature, as murder, theft, &c. will not defend ; but in dubious cases, whether the poinding be lawful or not, the authority of the judge is sufficient. THE LORDS, without giving a distinct categorical answer to these defences, fixed on a different point, insinuated by Sir James, in his informations, that Balmeg had transacted this plea with Douglas for 10 or 12 guineas, and that he could never recur in warrandice for more than what he actually paid himself ; as has been several times decided ; or at least he could only claim that with the expense of the process ; therefore they remitted it to the Ordinary to hear them on that precise point, which if true would determine the whole cause. Some of the Lords thought this was shunning a clear opportunity put into their hands, to let inferior judges know they would severely punish them for oppressing and concussing the poor lieges, under the shadow of law, and abusing their authority to covetous gripping extortion. That warrandice, in these cases, goes no farther than the sum paid, see Stair *Instit. l. 2. tit. 3.* and the decisions there cited.

Fol. Dic. v. 1. p. 227. Fountainhall, v. 2. p. 710.

S E C T. V.

Collateral Security.—Novation.—Partial Renunciation of a Security.

No 47.

A co-obligant in a bond is entitled to demand from the creditor a conveyance to any collateral security which the other co-obligant has granted to the creditor.

1752. *June 9.*

Mr ROBERT BLACKWOOD of Pitreavie, Advocate, *against* The CREDITORS of the deceased Sir ROBERT MILN of Barnton, and of Sir GEORGE HAMILTON of Tulliallan, and of Sir ARCHIBALD FLEMING of Farm.

IN 1683, Richard Lord Maitland granted an infeftment of annualrent upon the estate of Didhope, corresponding to the principal sum of L. 11,000 Scots, in favour of Robert Miln of Barnton.

There having been sundry transactions betwixt the said Sir Robert Miln and Sir George Hamilton, in 1697, they entered into a submission; and, by decret-arbitral, Sir Robert was found debtor to Sir George in a considerable sum, and was decerned to pay the same, or to assign debts to the extent. In implement of this decret-arbitral, Sir Robert conveyed sundry debts and subjects to Sir George, and, amongst others, the said infeftment of annualrent upon the lands of Didhope.

In 1699, Sir George Hamilton conveyed the said infeftment of annualrent, together with other subjects, in favour of certain of his creditors; but, as the subjects conveyed exceeded the debts, the creditors were taken bound to be accountable for any surplus that should be intromitted with by them, or to retrocess Sir George after they had received payment of their debts. And, in 1709, these creditors were infeft in the said annualrent.

Sir Archibald Fleming of Farm, son-in-law to Sir George Hamilton, being engaged as cautioner for him in sundry debts, obtained for his security from Sir George, in 1702, an heritable bond of relief, and a disposition of the estate of Tulliallan, and of the foresaid infeftment of annualrent upon the lands of Didhope. Upon this right, Sir Archibald expedite his infeftment in the lands of Tulliallan said year 1702, and in the said annualrent in 1706. The instrument of sasine upon the annualrent, in a few days after its date, was brought to the general register of sasines to be recorded. But it so happened, that Sir Archibald, or his doers, neglected to get it back from the keeper of the register.

In 1704, the said Sir George Hamilton granted bond to Sir Robert Blackwood for the sum of L. 7,500 Scots; and for his further security, conveyed to him certain debts due to Sir George; and in 1705, the said Sir George and Sir Archibald Fleming granted another bond to Sir Robert, narrating the former, and obliging themselves to pay the sums therein contained.

Upon this last mentioned bond in 1710, Mr Robert Blackwood, son to the said Sir Robert, obtained a decret of constitution against Sir William Fleming, apparent heir to the said Sir Archibald his father; and, upon a special charge to enter heir, adjudged from Sir William the foresaid heritable bond of relief and disposition granted by Sir George Hamilton to Sir Archibald Fleming; and up-

on this adjudication, Mr Blackwood expedite a charter under the Great Seal in 1718, and was thereupon infeft in the lands of Tulliallan, and such other subjects, contained in his adjudication, as held of the Crown.

In 1734, a ranking and sale of the lands of Didhope was brought at the instance of a creditor of Richard Lord Maitland; in which process, comparance was made for the Creditors of Sir George Hamilton, as having right to the foresaid infeftment of annualrent by the deed 1699, and infeftment thereon in 1709; and for Mr Blackwood, as having right thereto in virtue of the conveyance thereof by Sir George to Sir Archibald Fleming in 1702, and of Mr Blackwood's adjudication thereof above mentioned. And as, by reason of the sasines being neglected to be taken back from the recorders, as above mentioned, it was not then known that Sir Archibald had been infeft in the said annualrent-right in 1706, Sir George Hamilton's Creditors were preferred by virtue of their infeftment in 1709; and as their debts exceeded the value of the subject, no other creditor was ranked thereon: The decret of ranking was extracted in 1743, and the lands of Didhope sold.

After this, Mr Blackwood discovered in the register Sir Archibald Fleming's sasine of the foresaid annualrent out of Didhope, taken in 1706, and brought a process of reduction of the decret of ranking, the price of the lands being still *in medio*; and objected to the process of ranking, that it had been raised in the name of a person who was dead before raising thereof. 'THE LORDS, 3d January 1749, sustained the reasons of reduction so far as to entitle Mr Blackwood to be heard to dispute upon his infeftment, notwithstanding of the extracted decret of ranking, and his comparing and competing therein.'

Mr Blackwood being thus admitted, several particular objections were made to the preference claimed by him. And, 1st, it was *objected* by the Creditors of Sir Robert Miln, That, in the year 1697, Sir Robert Miln granted thirteen separate conveyances of his land-estate and heritable debts, and a general disposition of his whole personal estate in favour of Sir George Hamilton: That these were equal to a disposition *omnium bonorum*; and, as Sir Robert was thereby rendered insolvent, these conveyances, (and particularly this conveyance of the annualrent-right) were reducible at the instance of his prior creditors at common law, independent of the statute 1621, unless Mr Blackwood (who derives right to the said infeftment of annualrent through Sir George Hamilton) will prove that Sir Robert had other funds sufficient to satisfy his creditors.

Answered for Mr Blackwood, That he is not obliged, after so great a lapse of time, to bring a proof of Sir Robert Miln's solvency, or separate funds.

2dly, The conveyances were not voluntary, but in implement of a decret-arbitral.

'THE LORDS repelled the objection.'

Thomas Boyes and Douglas of Garvat, creditors of Sir Archibald Fleming, *objected* to the preference claimed by Mr Blackwood, that as Sir George Hamilton was the debtor, in the original bond, to Sir Robert Blackwood, and that Sir Archibald Fleming became bound in a bond of corroboration, it was evi-

No 47. dent Sir Archibald was only cautioner, and therefore free, by the septennial prescription, introduced by the 5th act of Parl. 1695.

Answered, That the statute is a correctory law, and therefore ought to be, and always has been, strictly interpreted, and has not been extended beyond the words thereof; and the present obligation does not fall under the words of it; for there is no clause of relief in the bond, nor bond of relief intimated to the creditor at receiving of the bond; but both obligants are bound conjunctly and severally, and are equally principal debtors.

‘THE LORDS repelled the objection.’

The said Thomas Boyes and Douglas of Garvat next *insisted*, That though Sir Archibald Fleming was not found entitled to the benefit of the septennial prescription; yet it was evident Sir George Hamilton was the original debtor to Sir Robert Blackwood; and that Sir Archibald, who became bound in the bond of corroboration, was only cautioner; and therefore, would have been entitled, in point of right, upon payment of the debt, to have demanded a conveyance from Mr Blackwood, of the debts assigned by Sir George to Sir Robert Blackwood, in security of the debt due to Sir Robert; from which it follows, that the diligence against Sir Archibald's estate cannot be carried into execution, to his creditor's prejudice, unless Mr Blackwood assigned to them the collateral securities granted by Sir George to Sir Robert Blackwood.

Answered for Mr Blackwood, That cautioners are entitled to demand from the creditor an assignation to collateral securities, upon this principle, that cautioners are only *subsidiarie* liable, after the principal debtor and his estate are discussed; and therefore the creditor cannot, to the cautioner's prejudice, give up any security he has on the debtor's estate. But the case is different with respect to co-obligants, who are bound conjunctly and severally, as Sir George and Sir Archibald are; for both of them are considered as principal debtors, and have not the benefit of discussion.

‘THE LORDS found it competent to Thomas Boyes and Douglas of Garvat, as creditors to Sir Archibald Fleming, to insist, that if Mr Blackwood should recover payment out of the annualrent-right, he ought to convey to them any collateral securities which were given to Sir Robert Blackwood by Sir George Hamilton.’

The said Thomas Boyes, as creditor to Sir George Hamilton and Sir Archibald Fleming, claimed to be preferred to Mr Blackwood, upon the said annualrent-right, for the following reasons, viz. That he had, upon Sir George and Sir Archibald's joint bond, led an adjudication against them in 1709, particularly adjudging from Sir Archibald the disposition of relief granted by Sir George to him; and, upon this adjudication, Mr Boyes expedite a charter in 1747, and was infeft in the said annualrent; and, as his adjudication was long prior to Mr Blackwood's he insisted to be preferred; and also *objected*, that Mr Blackwood's adjudication was void and null, as it proceeded upon a special charge against Sir William Fleming, to enter heir to his father Sir Archibald. And in the special charge,

neither the said annualrent nor the lands are contained ; but the letters of special charge still remain blank ; also Mr Blackwood's charter of adjudication was void, because it is from the Crown, though the annualrent holds of a subject ; and the sasine thereon was void, because not taken on the lands of Didhope, out of which the annualrent is upliftable, but is taken upon the lands of Tulliallan, with which this annualrent has not the least connection.

Mr Blackwood made no answer to these objections ; but *alleged*, That Mr Boyes's adjudication did not carry the said annualrent-right ; for the adjudication is led both against Sir George Hamilton and Sir Archibald Fleming, and adjudges both their estates separately, and adjudges this annualrent as belonging to Sir George ; and then it proceeds to adjudge several lands and subjects belonging to Sir Archibald ; and, among others, ' an heritable bond, disposition, or other right of relief, of what debts he stood bound for the said Sir George upon the foresaid lands and barony of Tulliallan.' Then there follows the usual general clause : ' Together with all and sundry reversions, bonds, &c. and all other rights, &c. made and granted in favours of the said Sir George and Sir Archibald, of and concerning the lands, baronies, &c.' above mentioned, ' and any annualrent or yearly duty to be uplifted forth of the same.' And Mr Blackwood *contended*, That the bond of relief adjudged from Sir Archibald is specially limited to be upon the lands of Tulliallan ; and that the general clause could not be so explained, as to carry subjects as belonging to Sir Archibald, which, by former clauses, were described as belonging to Sir George ; but must be explained *applicando singula singulis*, to adjudge from Sir George all right competent to him, of and concerning the subjects specially adjudged from him, and the same way with regard to Sir Archibald.

Answered for Mr Boyes, That, as he was not entitled to have possession of the disposition of relief ; so he could not describe it more particularly in his adjudication. But the description is sufficient, both to show the intention of the creditor to adjudge this right of relief, and also to distinguish it sufficiently from the other parts of Sir Archibald's estate ; and as the annualrent-right is mentioned in the libel, and all right competent to Sir George or to Sir Archibald, in the lands, &c. above mentioned, is adjudged, that was sufficient to carry the said annualrent-right either from Sir George or Sir Archibald:

' THE LORDS repelled the objection made by Mr Blackwood to Mr Boyes's adjudication ; and found that the said annualrent-right was thereby adjudged, as well from Sir Archibald Fleming as from Sir George Hamilton ; and sustained the objection made by Mr Boyes to Mr Blackwood's adjudication, and to the charter and sasine following thereon ; and found the said adjudication, charter and sasine, void and null.'

It was *objected* by some of Sir George Hamilton's Creditors to the preference claimed by Mr Blackwood, That the conveyance of the annualrent upon Didhope by Sir George Hamilton to Sir Archibald Fleming, was *spretæ inhibitione* ;

No 47. Robert Allan, Grizel Stewart, and Robert Haliburton, having, in February 1698, duly execute and registrate inhibitions against Sir George.

Mr Blackwood made *answer* to this, by objecting to the inhibitions. And, 1st, he *objected*, That Allan's inhibition is executed upon the 5th February 1698, against Sir George at his dwelling-house in Edinburgh, by affixing a copy upon the most patent door, &c.; and Haliburton's inhibition is executed the same day against him, as forth of the kingdom, at the market-cross of Edinburgh, pier and shore of Leith; and as he could not be in the kingdom and out of it at the same time, one of the executions behoved to be null.

To this it was *answered*, 1st, That he might, on the same day, be both in the kingdom and out of it; so that both executions might be good, supposing them to be executed at different times of the day.

2dly, The two executions cannot be set up in opposition to one another; each creditor stands on his own ground; and Mr Blackwood must choose which execution he will object to, and prove his objections.

'THE LORDS repelled this objection to the executions; but reserved to Mr Blackwood to disprove either of these executions as he should be advised.'

Mr Blackwood next *objected* to Grizel Stewart's and Robert Haliburton's inhibitions, That the executions were wrote upon a paper apart, and neither specified the debts upon which the inhibitions were raised, nor the date of the letters thereby intended to be executed; so that these executions would apply to any debt due by Sir George Hamilton to these creditors; and as inhibitions are intended to interpel the lieges from having any dealings with the debtor in prejudice of that particular debt, it ought therefore to appear with certainty, upon what debt the inhibition proceeded, and not to be in the power of a creditor to apply the execution of an inhibition to any debt, or any letters he shall think proper.

Answered for the inhibitors, That there was no law requiring the executions of inhibitions, to specify either the debt itself, or the date of the letters; and as these objections behoved to be registered within forty days, alongst with the letters, there was no hazard of applying the execution of one inhibition to another.

'THE LORDS repelled the objection.'

It was further *objected* to these two inhibitions, That the executions against the lieges were only at the market-cross of Edinburgh; whereas, supposing Sir George to have been out of the kingdom, they ought to have been at the market-cross of Edinburgh, pier and shore of Leith.

To this it was *answered*, That, as the lieges are considered to be in the kingdom, so there is no necessity to interpel them by any execution at the market-cross, pier, and shore; but the execution at the market-cross of the head-burgh of the jurisdiction where the debtor's principal dwelling-house is situate, is presumed sufficient notification to them.

'THE LORDS repelled the objection.'

It was further *objected* to the executions of all the inhibitions, That they did not bear that copies of the executions were left with, and for the party, and the lieges; but only that copies of the letters were left.

‘THE LORDS repelled the objection.’

Lastly, it was *objected*, That all action or ground of challenge upon the inhibitions for reducing the security granted by Sir George Hamilton to Sir Archibald Fleming in 1702, was barred by the negative prescription; no such action having been intended, or challenge made within 40 years of the date of the deed, nor even within 40 years of the time when the creditors behoved to be in the full knowledge thereof; for the deed, and infeftment thereon, in the lands of Tulliallan, were produced in a ranking and sale of that estate in 1708; also Sir Archibald's infeftment in this annualrent, taken in 1706, being upon record, the inhibitors cannot plead ignorance in bar of the prescription, seeing they might have known of the infeftment by searching the registers.

Answered for the Inhibitors, That only such deeds are reducible *ex capite inhibitionis* as are to the prejudice of the inhibitor; and therefore, though a debtor inhibited should grant twenty personal bonds, and as many dispositions, yet the inhibitor is not supposed to know of them; and though he should, he has no interest to reduce them, because they are not to his prejudice. Therefore, in this case, the prescription could only run from 1706, the date of the infeftment; and this action was commenced in 1744, *i. e.* two years within the years of prescription.

2dly, As Mr Blackwood was ignorant of the sasine, which was his own evident, and pleaded on it after the decret of ranking was extracted as *instrumentum noviter veniens ad notitiam*, surely the inhibitors are entitled to plead the same ignorance against this sasine, which now, for the first time, is founded on to their prejudice.

3dly, This process is a reduction brought by Mr Blackwood of the decret of ranking, and the interlocutors pronounced in favours of the defenders against the pursuer in the ranking and sale that was brought in 1734; and, as he is reponed against the judgment pronounced in that process, all things must be restored on both sides, and the present competition falls to be determined, as it ought to have been, in 1734; at which time, it was not 40 years from the date of the inhibitions themselves.

‘THE LORDS repelled the objection of prescription.’

Reporter, Lord Elchies.

For Mr Blackwood, Lockhart.

For the other Creditors, Ro. Graigie.

Clerk, Kirkpatrick.

B.

Fac. Col. No 10. p. 14.

1779. February 19.

THOMAS BUCHANAN and Co. against JAMES SOMERVILLE.

No 48.

A new company granted bill for a sum due by a former company, of which some of the new company were partners. An obligant in the former debt found no longer liable.

Messrs Bogle, Somerville, and Co. stood indebted to Thomas Buchanan and Co. in the sum of L. 97, for different articles by open account.

In July 1776, Somerville sold his share in the company to Jamieson, one of the partners.—The co-partnery contract expired 1st May 1777; on which day the dissolution of it was advertised in the news-papers, and the creditors of the company desired to apply to Messrs Bogle and Jamieson for payment.—From that time a new company took place, under the firm of Bogle, Jamieson, and Co. consisting of the former partners, with this variation, that Somerville was entirely out, and one new partner assumed.

Buchanan and Company soon after applied for payment of their account to Jamieson, who proposed, that, as immediate payment was not convenient, they should take a bill payable at six months date for the amount of the account.—The creditors agreed; but, understanding that the bill was to be accepted by the old company, drew it upon Bogle, Somerville, and Co. They likewise made out the account in their name, and subjoined a receipt to it in the following terms: 'Received their acceptance for the above L. 108:17:0, payable six months after date, which when paid is in full.'

In place of the above draught, the Creditors afterwards agreed to take a bill accepted by Bogle, Jamieson, and Co. for the money.

This bill, when due, was protested for non-payment against the acceptors, who, before that time, had become bankrupt; and afterwards the Creditors brought an action against all the partners of the old company, for payment of their account.—No appearance was made for any of them except Mr Somerville, the others being likewise partners of the new company, and acceptors of the bill.

Pleaded in defence for Somerville; The debt due to the pursuers by Bogle, Somerville, and Co. was discharged by the pursuers, who took in place of it the bill accepted by the new company;—consequently the defender is not liable.

The pursuers are, at any rate, *in mora*. They ought to have demanded their payment from him at the time the company was dissolved. If they had done so, he could have paid them safely, as the new company were at that time solvent. But the pursuers wilfully postponed their payment, by taking the bill at six months. They have themselves therefore only to blame, that they have come too late, and after their debtors are insolvent.

Answered for the pursuers; It is a transaction which will not, *in dubio*, be presumed, that a creditor consents to his debtor becoming free, upon another becoming bound. The consent of the creditor to free the original debtor must be clearly established; and, if circumstances can admit of another construction, it will not be inferred.

In this case, the pursuers did not give any absolute or unqualified discharge of the account to the partners of the old company on getting the bill. The discharge was only conditional, upon payment of the acceptance received for the amount of their account. If the bill had been paid, the condition would have been purified, and the discharge effectual to all parties. But, as it was not paid, no person is free from the debt who was formerly bound; and the partners of the old company, to whom the furnishings were made, are still liable.

This transaction did not cut out the defender from any relief against the partners of the new company, which he would otherwise have been entitled to. The claim of the pursuers for payment must have preceded any step taken by the defender for relief. If the pursuers had allowed the matter to lie over during these six months upon the footing of the open account, without taking any acceptance, the defender still would have remained liable;—yet, in that event, he would have been equally deprived of his relief, as in the case that has really happened.

THE COURT 'sustained the defences, and assoilzied the defender.'

Lord Ordinary, *Hailes.* Act. *Ilay Campbell.* Alt. *Wight.* Clerk, *Tait.*

Fol. Dic. v. 3. p. 175. Fac. Col. No 71. p. 135.

1793. June 29.

Messrs Edie and Laird, and the Other CREDITORS of JOHN WEIR, against
RACHAEL and ANNE ROBERTSONS.

IN 1773, John Weir granted an heritable bond for L. 470 Sterling, over the lands of Kerse, Daldaholm, and Clanochyett, in favour of Margaret, since dead, and of Rachael and Anne Robertsons.

In 1777, Mr Weir granted an heritable bond for L. 2000, over the lands of Kerse alone, to Messrs Edie and Laird.

In 1782, the Miss Robertsons renounced their heritable security over Clanochyett, with the sole view of accommodating Mr Weir, who intended to exchange these lands for others belonging to a neighbouring proprietor.

Mr Weir having afterwards become bankrupt, his estate was brought to judicial sale, when the lands of Kerse were sold for L. 1900, those of Daldaholm for L. 910, and the projected excambion of the lands of Clanochyett never having been carried into execution, they were sold for L. 810.

Miss Robertsons having applied to the Court for a warrant on the purchasers for L. 600, to account of the principal and interest due on their bond, their petition was remitted to the Lord Ordinary in the ranking; before whom Messrs Edie and Laird, and the other creditors of Mr Weir

No 49.

A preferable catholic creditor may, before the bankruptcy of his debtor, renounce part of his security, without diminishing his right over the remaining subjects contained in it, although such renunciation should hurt the security of a secondary creditor, obtained before its date.

No 49.

Objected; That as Messrs Edie and Laird were creditors by heritable bond over Kerse alone for L. 2000, and bygone interest, a sum which exceeded the price it had brought, and as the renunciation executed by the Miss Robertsons was posterior to the date of the bond to Messrs Edie and Laird, the Miss Robertsons were not entitled to draw out of the price of the lands of Kerse and Daldaholm that proportion of the sum due to them, which they would have received out of the price of Clanochyett, had they not renounced their infeftment over these lands, because their doing so would have the obvious effect of diminishing improperly the only fund from which Messrs Edie and Laird must obtain payment of their bond. The common debtor was bound in justice to pay the Miss Robertsons out of the other lands, so as to leave Kerse free, for the satisfaction of the posterior debts with which he had burdened it; and if so, the Miss Robertsons were not entitled to concur in any deed which put it in his power to elide this duty. If a creditor, whose debt is secured by a cautioner, do diligence against the principal debtor, or obtain an heritable security from him, and afterward pass from the one, or discharge the other, the cautioner is *ipso jure* free from his obligation; 21st January 1729, M'Millan against Hamilton, and 16th July 1730, Graham against Lyle, No 39. p. 3390.; Erskine, b. 3. tit. 3. § 66. and tit. 5. § 11. Upon the same principle, the renunciation in the present case cannot affect the interest of the objecting creditors; Kames's Pr. Eq. b. 1. §. 1.

Answered; When an heritable bond is granted over several subjects, each is liable, not for a proportional part only, but for the whole of the debt, and the creditor may lay the burden entirely upon any one of them. The renunciation, therefore, as to Clanochyett, cannot weaken that security which the Miss Robertsons had *ab ante* over Kerse and Daldaholm.

When a person lends money upon land, he is presumed to have searched the records to learn with what preferable burdens the subject is affected. But when a creditor, having a prior catholic security, renounces it in part, there is no tie upon him, even in equity, to consult registers, in order to discover the effect this measure will have upon the interests of secondary creditors. The present, therefore, is very different from the case of a creditor who renounces a separate security, to the prejudice of his cautioner. The latter, on payment of the debt, would have been entitled to an assignation of that security, and the creditor cannot be ignorant of the existence of his obligation and claim of relief.

THE LORD ORDINARY having reported the question, on minutes of debate, it was

Observed on the Bench; When the Miss Robertsons granted the renunciation in question, they could not know that there was a posterior creditor who would be hurt by it. A person lending his money on land already affected by incumbrances, ought to be satisfied that it is sufficient both to purge them, and

to pay his own debt, and not trust that the prior creditors will draw their payment from other collateral securities which may be renounced. There is no similarity between the present case and that of a creditor who has the security of a cautioner. There the creditor lies under an implied obligation to distress the cautioner as little as possible; but between the Miss Robertsons and Edie and Laird, there was no connection whatever. It is no doubt a general principle, that a catholic creditor is obliged either to draw proportionally out of all the subjects over which his right extends at the time when he obtains payment, or to assign; but in no case is he obliged even to do this, so as to hurt his own interest.

THE COURT unanimously repelled the objection.

Lord Ordinary, *Craig*. Act. *Wolfe Murray*. Alt. *Wm. Robertson*. Clerk, *Home*
Fol. Dic. v. 3. p. 175. Fac. Col. No 68. p. 146.

Relief among *Correi Debendi*, whether *in solidum* or only *pro rata*. See SOLIDUM ET PRO RATA.

Rights affecting the subject acquired by the disponent, cannot be extended against the disponent, bound in warrandice, further than to pay the transacted sum. See MUTUAL CONTRACT.

Superior taking a gift of recognition, &c. how far he can extend this against his vassal. See JUS SUPERVENIENS.

Creditor bound to maintain possession of the subject he derives from his debtor in security of his debt, and cannot invert possession to his prejudice. See MUTUAL CONTRACT.

Preferred creditor bound to assign to the postponed. See BENEFICIUM CEDENDARUM ACTIONUM.

See APPENDIX.

DECLARATOR.

SECT. I.

Gift of Non-entry.—Gift of Ward.

1541. July 16. LORD BORTHWICK *against* —.

IN causa domini de Borthwick actoris, interlocuti sunt domini, that the ourlord may *etiam per donatorem*, perseu the profits and duties of lands being in his hands be non-entrese, or ane decreet of non-entrese; albeit ony lands be comprised for the bygone mails, necessare they be decerned be decreet of the Lords in non-entrese.

No 1.

Fol. Dic. v. 1. p. 228. Sinclair, MS. p. 2.

1549. May 28. LAIRD of Dunnoone *against* ROBERT STEWART.

Gif lands fall in the superiour's handis be ressoun of ward, he may at the next term warn the occupiaris thair of to flit and remove thairfra, and put his handis to the samin landis, and intromet thairwith; and it is not necessar that he call the tenentis and utheris to heir and see the samin landis decernit to have fallin in ward, and thairby to pertene to him, albeit it be itherways in cais of non-entres, in the quhilk it is necessar that the landis be first decernit be decrete of the Lordis to be in non-entres.

No 2.
Superior of ward lands may remove tenants without declarator, but not in case of non-entry.

Fol. Dic. v. 1. p. 228. Balfour, (REMOVING.) No 20. p. 460.

No 3.

A donatar to ward lands may enter to the possession of the ward lands, actually possessed by the defunct, without declarator; but it was found ejection to dispossess the tenants before declarator.

1595. July 4.

ROBERT FLETCHER *against* EARL of ATHOLE, Tutor to the EARL of MURRAY.

ROBERT FLETCHER, burgess of Dundee, pursued the Earl of Athole as tutor to the Earl of Murray, for ejecting of him furth of the fishings of Spey, set to him in tack be the umquhile Earl of Murray.—It was *alleged*, That the defender did na wrang, and should be assolizied, because the King's Majesty having disposed to him the waird and marriage of the Earl of Murray; and sua, being donatar to the waird, was not obliged to respect any tacks of that whereof the defunct was in possession.—It was *answered*, That the allegiance should be repelled; and the LORDS fand, That the donatar to ane ward may enter to the possession of any lands actually possessed be the defunct's self, without declarator, but in things possessed be sub-tenants, declarator was always necessar.

Fol. Dic. v. 1. p. 228. Haddington, MS. No 570.

A. *against* B.

No 4.

DECLARATOR of non-entry was found unnecessary where the gift was in favour of the heritor himself. *See APPENDIX.*

Fol. Dic. v. 1. p. 228. Haddington, MS.

No 5.

An adjudication was found null, being founded upon a gift of non-entry without declarator; for non-entry must be declared, in order to make it become a liquid debt.

1678. July 19.

POURIE FOTHRINGHAM *against* The MARQUIS of DOUGLAS.

IN Pourie Fotheringham and the Marquis of Douglas's case, an adjudication was found invalid, because the ground of it was a gift of non-entry, which ought first to have been declared, before it was a liquid debt, and it was still undeclared. THE LORDS found the adjudication null, but restricted it to the sums contained in the bonds whereupon it was led; 2do, In Pourie's cause against Hunter of Burnside, they found where a clause irritant, (resolving the feu on cessation *per triennium* to pay the feu-duty,) is in a charter, and a reduction is raised by the superior for annulling the feu, for [the vassal's] not paying the feu-duty by the space of three years, that the said failzie cannot be purged at the bar; but if the feu or other charter want that resolute irritant clause, and the declarator only concludes amission of the feu, upon the 246th act of Parl. 1597, as inherent *de jure, et ex natura rei*, the LORDS declared they will find that *mora* purgeable at the bar, any time *ante sententiam in delatoria obtentam*.

Fol. Dic. v. 1. p. 228. Fountainhall MS. & v. 1. p. 10.

S E C T. II.

Gift of *Ultimus Hæres*, and of Bastardy.

1662. July 30. LAIRD BALNAGOUN against DINGWALL.

THE Laird of Balnagoun having obtained a gift of *ultimus hæres*, of Thomas ———, from the exchequer, in anno 1661, and being thereupon infest, pursues removing against Rorie Dingwall. The defender *alleged* absolutor, because the defender stands infest, and by virtue of his infestment in possession seven years before the warning, by virtue of a gift of *ultimus hæres*, granted by the English Exchequer. The pursued *answered*, ought to be repelled, because the foresaid gift is null, *ipso jure*, in so far as it is not confirmed by the late act of Parliament, anent judicial proceedings in the usurper's time, wherein gifts of bastardy and *ultimus hæres* were excepted. The defender *answered*, *imo*, That his infestment being clad with seven years possession, cannot be taken away by exception, neither is he obliged *in hoc judicio possessorio*, to dispute the validity thereof. *2do*, The said act of Parliament doth not declare null, much less null by exception, such gifts, but doth only not confirm them.

THE LORDS repelled this defence, and found the infestment null in itself, seeing it was not confirmed.

The defender further *alleged* absolutor from this warning, because the pursuer's gift is not yet declared. It was *answered* for the pursuer, no necessity of declarator, because it cannot be ever made appear that any such thing was required, or was in custom and use, more than in the case of a gift of ward, or a gift of forefaultry.

THE LORDS found that this gift behoved to be declared in the same way as a gift of bastardy.

Fol. Dic. v. 1. p. 228. Stair, v. 1. p. 139.

* * * Gilmour reports the same case :

IN an action of removing, pursued at Balnagoun's instance against Rorie Dingwall, upon a gift of *ultimus hæres*, and infestment following thereupon, THE LORDS found no process could be sustained, unless the gift were declared ; for though the defunct had neither heir, nor apparent heir ; yet of necessity there should be a declarator, whereunto, at least, all parties having interest should be cited at the market cross in general ; just as to a service as heir, the brieve is so executed by law.

Gilmour, No 49. p. 36.

No 6.
A gift of *ultimus hæres* must be declared the same way as a gift of bastardy.

No 7.

Found as
above.1666. *July 31.* THOMAS CRAWFORD *against* TOWN of EDINBURGH.

THOMAS CRAWFORD, having gift of *ultimus hæres* of a person, to whom the Town of Edinburgh was debtor, pursues for payment thereof. The defender *alleged* no process, till the gift were declared. The pursuer *answered*, no necessity of a declarator in this case, more than in a gift of recognition and ward, and that there was no person that could be particularly cited.

‘THE LORDS found the defence relevant, that this gift behoved to be declared albeit it were but upon a citation generally against all and sundry at the market cross.’

Fol. Dic. v. 1. p. 228. Stair, v. 1. p. 403.

* * Newbyth reports the same case :

THOMAS CRAWFORD having obtained a gift of *ultimus hæres* of one Oliphant, pursues the Town of Edinburgh, as they who were debtors to the defunct in the sum of 2400 merks, for payment thereof. It was *alleged* for the Town, no process for payment of the money to the pursuer upon this gift, because it was not declared. To this it was *answered*, no necessity of a declarator of a gift of *ultimus hæres quoad mobiles* and sums of money ; *imo*, Because the King’s right, as last heir, is founded *super jura coronæ*, and that the King, upon the decease of any person, dying without agnate or cognate, may, *brevi manu*, intromit with the moveables belonging to the defunct, and is only liable to restore, *si verus hæres appareat* ; and such gift cannot be declared otherways nor by pursuits against the defunct’s creditors by payment ; for the defunct having no relations of blood, there can be no person competent to be called, against whom the declarator can be intended. THE LORDS found there was a necessity of a declarator, and therefore found no process.

Newbyth, MS. p. 82.

* * Dirleton also reports this case :

A DONATAR, by a gift of *ultimus hæres*, having pursued for a moveable debt due to the defunct, the pursuit was not sustained, because the gift was not declared.

Dirleton, No 38. p. 16.

1684. February. DR TAYLOR *against* BRUCE and STRANG.

It being *alleged* against a removing, at the instance of a donatar of *ultimus hæres*; That the gift is not declared, which ought to have been done: *2do*, That the pursuer was infeft after the term of removing; and though he had been infeft before the term, and after the warning, the infeftment could not be drawn back in favours of him a singular successor:

Answered: It is absurd to require a declarator of a gift of *ultimus hæres*, the defunct having no heirs to be called in such a process; for if he had heirs, there would be no place for an *ultimus hæres*.

Replied: There ought to be a declarator, though proceeding but upon a general citation of all persons having interest, at the market cross, as was found the 31st of July 1666, in the case of Thomas Crawford *contra* Town of Edinburgh, No 7. p. 3410.; and Balnagown against Dingwall, No 6. p. 3409.

'THE LORDS found, That a gift of *ultimus hæres* ought to be declared as well as a gift of bastardy.'

Fol. Dic. v. 1. p. 228. Harcarse, (REMOVING.) No 840. p. 240.

No 8.
Found as
above.

1684. February 25. TAYLOR *against* ———.

THE LORDS, in the case of Doctor Taylor, servitor to the Dutchess of Portsmouth, 'found that he, as a donatar to the bastardy, and *ultimus hæres* of ———, had right, without a declarator.'——Though in Durie's time, and twice since the King's return, it is decided, that these gifts always need declarator, viz. 30th July 1662, Ross of Balnagoun, No 6. p. 3409.; and 31st July 1666, Crawford, No 7. p. 3410.

Fol. Dic. v. 1. p. 228. Fountainball, v. 1. p. 274.

No 9.
A gift of bas-
tardy was
found not to
require a de-
clarator.

SECT. III.

Gift of single and liferent Escheat.

1610. November 28. WHITEBANK *against* HOME.

DOUBLE-POINDING being raised by the debtor of him who was put to the horn, against the said creditor on the one part, and the donatar upon the other;

No 10.

No 10. albeit the donatar have declarator depending,—yet so long as he has not decret, the creditor being relaxed, will be ordained to be answered and obeyed, he finding caution to make it furthcoming to the donatar, in case he prevail in his declarator.

Fol. Dic. v. 1. p. 228. Haddington, MS. v. 2. No 2017.

1668. December 18. ROBERT SWINTOUN against JOHN BROWN.

No 11.

A gift of life-rent escheat was not sustained without declarator, though proponed by way of exception.

MARGARET ADINSTOUN being infest in liferent, in certain roods of land near Haddington, she and her second husband grant a tack to John Brown thereof for certain years, and thereafter till he were paid 400 merks, owing to him by the husband; after that husband's death, she being married to a third husband, there is a decret of removing purchased at her and that husband's instance, against John Brown, but the husband did not proceed to obtain possession by virtue thereof, but *brevi manu* ejected Brown; whereupon Brown obtained a decret of re-possession: now the said Margaret Adinstoun having assigned the decret of removing to Mr Robert Swintoun, he charges John Brown to remove, who suspends on this reason, that he having obtained decret of re-possession, after the decret of removing, upon the husband's violence, cannot now be removed without a new warning. The charger *answered*, that the decret of re-possession, bearing to be ay and while this suspender was legally removed, and that in respect he had been put out summarily, and not by the preceding decret of removing; which having now taken effect, he being in possession, the charger may very well insist, that he may now legally remove, by virtue of the decret of removing.

THE LORDS repelled this reason, in respect of the answer, and found no need of a new warning.

The suspender further *alleged* that he cannot remove, because he bruiks by virtue of a tack granted by Margaret Adinstoun and her second husband. The charger *answered*; 1st, That the tack being only for four years specially, and an obligation not to remove the tenant while the four hundred merks were paid, which is not a tack, but a personal obligation, which cannot defend the suspender against Mr Robert Swintoun, the singular successor; 2dly, The tack is null, being subscribed but by one notary. The suspender *answered*, that a right of liferent not being transmissible by infestment, but only by assignation, the assignee is in no better case than the cedent, except as to the probation by the cedent's oath. 3dly, The tack is ratified judicially by the wife, in the court of North Berwick, which is more than the concurrence of any notary. 4thly, If need be, it is offered to be proven by the wife's oath, that the subscription was truly done by the notary, at her command. The charger *answered*, that the judicial ratification cannot supply the other notary; ~~because~~ the same no-

tary, who is notary in the tack, was also notary in the judicial ratification, which is but done in a baron court : So it is but *assertio ejusdem notarii*, no stronger than it was, neither can it be supplied by Margaret Adinstoun's oath, *de veritate facti* ; because her oath cannot be received in prejudice of her assignee ; and though herself were charger, the law requiring two notaries, till both subscribe, the writ is an unsubscribed writ ; and in all matters of this nature, parties may resile before subscription.

THE LORDS found the tack valid against the wife, subscriber thereof, and her assignee, ay and while the sum thereof were paid ; but found the tack was null, as being but by one notary, notwithstanding of the judicial ratification being by the same notary ; and found that the cedent's oath could not be taken in prejudice of the assignee, to astruct the verity of the subscription, unless the assignation had been gratuitous, or the matter had been litigious before the same : In which case they found that there was no place to resile after the subscription of the first notary, the verity and warrant of the subscription being proven by the said Margaret's oath.

The suspender further *alleged*, that he could remove, because the liferenter being year and day at the horn, he had a gift of her liferent escheat, and thereby had right to possess her liferent land. The charger *answered non relevat*, because the gift was not declared : *2do*, It could not be declared, because it proceeded upon a horning, against a wife clad with a husband, who being *sub potestate viri*, cannot be contumacious, or denounced rebel thereupon. The suspender *answered*, that he needed not declarator himself, being in possession of the only right, to which the declarator could reach. *3tio*, The horning, albeit against a wife, was valid unless it had been upon a debt contracted during the marriage ; yet this horning proceeding upon a decreet against a wife as executrix and vitious intromissatrix with her husband's goods, a horning upon her own fact or fault was always effectual.

THE LORDS would not sustain the gift without a declarator, and superceded any extract at the charger's instance, till a day, betwixt and which he might insist in his declarator, and superceded till that time to give answer, in relation to the horning, because the King's officers behoved to be called.

Fal. Dic. v. 1. p. 228. Stair, v. 1. p. 574.

S E C T. IV.

Gift of Recognition.

No 12. 1635. November 27. BLACK *against* PITMAIN.

A GIFT or recognition without declarator, although the donatar of recognition obtain possession, cannot take away a feu infestment, whereof the feuar was in possession.

Fol. Dic. v. 1. p. 229. Auchinleck, MS. p. 180.

No 13. 1699. November 24. BALMERINO *against* TOWN of EDINBURGH.

THE master of Balmerino, as baron of Restalrig, pursues a reduction and improbation against the Town of Edinburgh, of their right to the mills on the Water of Leith. *Alleged*, The active title is not valid to force a production, being only a charter and sasine flowing upon a gift of recognition from the King, and the gift never yet declared. *Answered*, No necessity of a declarator, because he was in peaceable possession. *2do*, It contained a *novodamus*. *Replied*, If the recognition should be found not incurred, the *novodamus* would fall in consequence; and one might as well pursue a special declarator of escheat, without first obtaining a general. THE LORDS refused to sustain process on this title.

Fol. Dic. v. 1. p. 229. Fountainhall, v. 2. p. 69.

S E C T. V.

Divorce.—Failzie.—Redemption.—Extinction by Intromission.—
Gift of Forfeiture.

No 14. 1579. February 6. LADY RESTALRIG *against* THE LAIRD.

After sentence
of divorce
pronounced
*propter culpam
mariti* the
wife may im-
mediately en-
ter to the pos-

THE Lady Restalrig wairnit the laird of Restalrig, some time her husband, she being divorced fra him *ex culpa viri*, to flit and remove fra certain lands. The laird *answerit*, that albeit he was divorced, yet there was no declarator given, wherefor he should not bruik the lands that she was in; and of the practick that had passed before, ay after the sentence of divorsement pronounced and

given be the commissars, there behoved ane declarator of the civil judge to follow upon these lands, because the commissars being judges spiritual, their decret could not be extended *ultra fines sue jurisdictionis, et quæ civilia fuerunt et profana, non debebant ab iis tractari extra de ordin. cognit.* To this was answered, that first to the practics, that they were not alike, for in all the practics before past, both the parties, *vel saltem* the party failzier was in the land, either be conjunct fee or otherwise; but in this case the Lady Restalrig was only in the land, and so being only infest, there misterit na declarator more nor if her husband the laird had been naturally dead. And as to the law, it was nothing against the law, that the commissars' decret should, be their ain sentence, take effect *quia unicuique judici licet sententiam suam executioni mandare.* THE LORDS pronounced be interlocutor, that in respect the Lady was only in the lands there misterit na declarator, albeit the same appeared to repugn to all the precepts past of before.

Fol. Dic. v. 1. p. 229. Colvil, MS. p. 277.

No 14.
session of her
liferent lands
without any
declarator.

1624. January 21.

M'MATH against L. OCHILTREE.

JAMES M'MATH and some other merchants, having furnished to my Lord Ochiltree certain sums of money, which he bound him to pay to them at the terms contained in the bond, and for their security of payment, in case of failzie of payment, and in warrandice thereof, he gave them charter and sasine of the lands of Saltoun; upon the which charter and seisin, they having convened the tenants of the said lands for payment of their duties,—THE LORDS found that the tenants could not be convened for payment, by virtue of the foresaid charter and sasine, which was given in warrandice, as said is, until the time that the pursuers had obtained declarator, upon the failzie of payment, against the principal party their debtor; for it was not pertinent to these defenders to dispute, neither could they know if the pursuers were paid or not, or if there was a failzie, or if the party had made payment, and so had purged the failzie; for that dispute was only proper to the debtor, who contracted with the pursuers, and not to these defenders.

Act. Stuart.

Alt. Neilson.

Clerk, Hay.

Fol. Dic. v. 1. p. 229. Durie, p. 99.

No 15.
An heritable
bond was
granted for
security of
payment of a
debt in case
of failzie.
The creditor
raised an ac-
tion of mails
and duties.
The Lords
found that he
behooved first
to obtain de-
clarator of the
failzie.

1629. July 29.

PHILIP against PHILIP.

A FATHER having infest his daughter in an annualrent furth of his lands, redeemable by himself for a small sum, and in his own time redeems the said annualrent; after his decease, the daughter pursues poinding of the ground for the said annualrent, from the heir of one to whom her father sold the lands.

No 16.
A father infest
his daughter
in an annual-
rent, redeem-
able by him-
self. He hav-
ing redeemed

No 16.
it, the Lords
found no ne-
cessity for a
declarator of
redemption.

He *alleges*, That the annualrent was redeemed by her father. It was *replied*, That no declarator was obtained against the redemption. THE LORDS found no necessity of a declarator in this case.

Fol. Dic. v. 1. p. 229. Auchinleck. MS. p. 183.

No 17.

1673. July 25. MURRAY against The Tutor of STORMOUNT.

By a contract of wadset, the wadsetter being liable to compt for the excrescence of the duties more than should satisfy the annualrent;

THE LORDS, in a process for mails and duties, found the exception relevant, that the pursuer was satisfied of the sum upon the wadset, by his intromission, without declarator.

Fol. Dic. v. 1. p. 229. Dirleton, No 176. p. 71.

No 18.

Though a gift of forfeiture pronounced in Parliament need no declarator, there can be no action upon such gift, without declarator, where the forfeiture is in virtue of a sentence before the court of justiciary.

1683. March. LORD LIVINGSTON against ROGER GORDON of Troquhen.

In an action of mails and duties, at the instance of a donatar of forfeiture, it was *alleged* for the defender, No process till the gift be declared.

Answered: Gifts of forfeiture pronounced in Parliament need no declarator; and by a late act of Parliament it is declared, That forfeitures in absence before the justice court, shall be in the same case as if they had been led in Parliament.

Replied: The design of the late act was only to make forfeitures in absence before the Justices equivalent to forfeiture where the party is present; and as gifts of forfeiture where the party is present, have always required to be completed by declarator, that can be no less necessary to gifts of forfeiture in absence. And Hope, in his Form of Process, and likewise Craig, are clear, that where forfeiture passes by act of adjournal, the gift requires declarator.

THE LORDS found declarator ought to be raised incidentally, and thereafter the pursuer might insist in his process; although it was contended, that seeing the Lords of Session were not competent Judges to any nullity or informality of a criminal process, they could not be proper Judges to the declarator.

Fol. Dic. v. 1. p. 229. Harcarse, (FORFEITURE.) No 491. p. 135.

Irritancy, whether it requires declarator; See IRRITANCY.

See Ramsay against Mackison, 5th March 1624, Durie, p. 117. *voce* ESCHEAT.

Touch against Hume, 9th March 1624, Durie, p. 119. *voce* ESCHEAT.

See ESCHEAT.—See APPENDIX.

DECLINATOR.

1532. February 15. MASTER of GLENCAIRN against PRIOR of ST ANDREWS.

GIF ony Lord of Sessioun, or uther Judge within this realme, say to ony partie, or his procuratour, that he micht have better libellit or zit answerit better to the libel intentit aganis him nor he did, he, as suspect and partial in the cause, may be removit at the desire of the partie.

No 1.

Fol. Dic. v. 1. p. 230. Balfour, (JUDGE.) No 18. p. 285.

1545. March 4. LORD METHVEN against LORD GRAY.

DEIDLIE feid standand unreconcilit betwixt the partie and the Schiref, or ony uther inferiour Judge, the said partie and his partakeris, with their houshald-men, tenentis, and servandis, aucht and sould be exemit fra the jurisdiction of the said Schiref or Judge; and the Lordis of Counsal are Jugeis competent to all actiounis and causis concerning the said persoun, and his foirsaidis, quhilk aught and sould have had process befor the said Schiref or Judge, to be callit befor thame, but diet or tabil.

No 2.
Deadly feud betwixt a party and an inferior judge, was found a good reason of advocacy.

Fol. Dic. v. 1. p. 229. Balfour, (ADVOCATION.) No 2. p. 340.

1545. JOHN WEIR against JOHN BANNANTYNE of Corhouse.

GIF the partie alledgeand, that the Judge is suspect and has gevin partial counsal aganis him, and the Judge at his desire purgis himself theirow, he may not thairefter desire the cause to be advocatit fra him, as Judge suspect and incompetent, because, be the proponing of the said exception of partial counsal, and the Judge's purgation maid thairanent at his desire, he is understuid to have appreivit and admittit him to be Judge, and thairfor efterwart may not decline his jurisdiction.

No 3.
A Judge, purged upon oath of partial counsel, may not be declined.

Fol. Dic. v. 1. p. 230. Balfour, (EXCEPTION.) No 4. p. 343.

No 4.

1555. *March 17.* LETHENTON *against* LAIRD OF KIRKSTORPHON.

ALL *curatores ad negotia* may be no Judges nor witnesses in ane action pertaining to them that they are *curatores* to, howbeit that there be uther *curatores ad lites*.

Fol. Dic. v. 1. p. 230. Maitland, MS. p. 119.

No 5:

An inferior judge's decree being reduced on the head of iniquity, the party, at whose instance the reduction was obtained, was found thenceforth exempted from the jurisdiction of that judge, in all other causes.

1561. *February 6.* JOHNE SCHEILL *against* JOHNE GUDELAD.

Gif ane Schiref, or uther inferior Judge, gevis ane decreit aganis ony persoun, the quhilk, thairefter, at the samen persoun's instance is reducit and clarit to have bene wrangouslie gevin aganis him, he sould be exemit fra the jurisdiction of the said Schiref or Judge in time to cum, in all uther causis and actionis pertening to him.

Fol. Dic. v. 1. p. 229. Balfour, (ADVOCATION.) No 5. p. 341.

No 6:

Some of the Lords of Session being chosen arbiters in a cause, may nevertheless sit and vote with the other Lords, in the execution of the decree-arbitral.

1591. *August.* COLUTHIE *against* FINGASK.

THERE was a submission of certain debates and quarrels betwixt the Laird of Coluthie, on the ane pairt, and the Baron of Fingask, who made a certain number of the Lords of Session, viz. three to every partie, and in case of variance, the chancellor to be oddsmen and oersman.—The decret being given be the chancellor, because the Judges arbiters could not agree, thereafter Coluthie socht the decret to be registrate. It was *opponit* againes the registration, That all the persons who wer chosen to be arbitrators, could not be Judges, but aught to be removit, as they who had given partial counsall, as was practised sundrie tymes of before. It was *answerit*, That albeit there was certain number of the ordinar Judges of the Session that were chosen *arbitri aut arbitratore obligantibus*; yet now when the registration and execution of the thing was decernit, the self same persones might be Judges *quia aliud est arbitrium, aliud judicium*; for utherwise the decret arbitral sould skairsely take effect, for such a great number of Lords being declynit, there would not rest behind to make furth the ordinar number. THE LORDS repellit the declinator, and fand the decret arbitral sould be registrate.

Fol. Dic. v. 1. p. 230. Colvil, MS. p. 471.

1605. July 26.

CLERKINTON *against* HERDMISTON.

IN a removing betwixt the Laird of Clerkington and Herdmiston, the LORDS found, that a wife could not give her oath, in prejudice of her husband, upon any promise alleged made by her, either before her marriage or after it. In that same cause they found, that my Lord of Cranston could not be Judge; because the defender's exception was founded upon a contract betwixt the parties, which my Lord Cranston had devised and caused form, and therefore could not judge upon it;—and alleged the practic bewixt Innerwick and Coudenknows, wherein my Lord of Thirlestane, chancellor, was declined, because he had devised and caused form the contract betwixt my Lord Home's father and Innerwick's father, whereupon their cause depended.

Fol. Dic. v. 1. p. 230. Haddington, MS. v. 1. No 949.

No 7.

Found that a Lord of Session, who drew up a contract, might be declined, when any cause was intended upon that contract.

1629. January 8.

GEMMIL *against* BOYLE.

IN an advocacy, the Procurator-Fiscal of Glasgow, being executor decerned to a defunct, and pursuing the debtors of the defunct for payment before the commissary of Glasgow, and the cause desired to be advocated, because the Procurator-Fiscal was brother to the Commissary, and so, by the act of Parliament 1594, 'A brother could not be Judge in his brother's cause pursued before him';—this reason was sustained and found relevant, and the cause was advocated; for albeit it was *answered*, That the cause was intended at the Procurator-Fiscal's instance, who was brother to the Judge, yet he pursued only *ratione officii*, and the profit would not redound to him, but to the nearest of kin to the defunct; likeas the Procurator-Fiscal declared, by the procurators compearing for him in this advocacy, that the pursuit was not to his own behoof, and that he renounced all benefit which he should recover thereby, in favours of the nearest of kin; yet the reason was sustained, seeing he remained still pursuer, and that his brother could not be Judge in a pursuit wherein he might have interest; but he might surrogate one in his place after he was decerned, who confirming, or obtaining licence from the Commissary, or the bishop of the diocese to pursue, might then pursue before that Judge; but the Procurator-Fiscal being brother to the Judge, and being undenuded, if none should seek the gear, as nearest to the defunct, and so thereby the same should remain with the Procurator-Fiscal, it were against the law that the brother were Judge in the brother's cause; and this was also found, albeit the cause desired to be advocated, was referred to the defender's oaths, without further process.

No 8.

Though a procurator-fiscal decerned executor, pursue *ratione officii*, yet if he do not substitute one in his place, the action may be advocated, if the judge be his kinsman.

Act. McGill.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 1. p. 231. Durie, p. 412.

19 Q 2

* * * Spottiswood reports the same case :

No 8.

JAMES BOYLE, Procurator-Fiscal of Glasgow, being executor decerned to Agnes Mullikin, convened her husband, as intromitter with her goods and gear, for payment of certain sums of money. This action was craved to be advocated from the Commissary of Glasgow, because the pursuer and the Commissary were brethren. *Alleged*, That he pursued only *ratione officii*, being Procurator-Fiscal, and that the benefit would never acresce to the nearest of kin. Likeas, he was content to renounce all benefit that might fall to him there-through; and further, he did refer the verity of the debt to the defender's oath. ' THE LORDS did advocate the cause, in respect he pursued as executor decerned, and had not surrogate any in his place, notwithstanding of his office.

Spottiswood, (ADVOCATION.) p. 111.

1682. *March.*

HUGH MAXWELL *against* LORD NEWTON.

No 9.

FOUND, that by the late act of Parliament*, the degrees of affinity reached only to that of father, son, and brother; and not to nephew, brother's son, &c. seeing properly those in that degree are either consanguineans, or absolute strangers; *e. g.* a brother-in-law's son by my sister is not *affinis*, but *consanguineus* to me; and a brother-in-law's son by another wife than my sister, is not *affinis* to me, but an absolute stranger, seeing *affinitatis nulla affinitas*: it was *plcaded*, That by the said act only the affinity of *socer, levir, gener*, father, brother, and son-in-law, was meant, which arises by a conjunction with a consanguinean, and not the affinity of *vitricus, privignus, &c.* step-father, step-son, &c. But this point was not determined; and it was also debated if a Judge might be as well declined upon his wife's account, as upon his own.

Fol. Dic. v. 1. p. 230. Harcarse, (DECLINATORS.) No 399. p. 106.

1687. *December.*

SIR WILLIAM BINNY *against* HOPE.

No 10.

THE LORDS repelled the declinator against my Lord Harcarse, that Sir William Binny the pursuer was brother-in-law to my Lord, by marrying his Lady's sister, and was also uncle-in-law to my Lord's Lady, who was then deceased, but had left a child of the marriage behind her; that relation being only *affinitas affinitatis*, which the act of Parliament extends not to. And the like declinator in another case, against the said Lord Harcarse, that Hugh Wallace and he had married two sisters, was rejected, the Lady being dead. The first declinator was proponed by Sir Thomas Hope of Kerse, and the other by Lord Forrester; the like will hold as to being witness.

Fol. Dic. v. 1. p. 230. Harcarse, (PROBATION.) No 806. p. 226.

* Act 13th Parl. 1681.

1699. June 21. SIR JOHN PRESTON *against* MR ROBERT RULE.

SIR JOHN PRESTON having obtained a decret before the Sheriff of Fife, against the Lady Kinglassy, pursues Mr Robert Rule, as executor to her, for payment.

It was *alleged* ; That the decret against the defunct was in absence, holding the Lady as confessed and pronounced by the pursuer's uncle, who could not be Judge in his cause ; and therefore the defender ought yet to be reponed against the decret, and the debt instructed.

It was *answered* ; The relation of the Judge was a ground of declinature, but is no nullity of the sentence ; because the 13th act, Parl. 1681, expressly provides, that Judges in that degree of relation be declined ; but doth not provide, that the sentence shall be void, which might have many bad consequences ; for, by the same reason, decreets of the Lords might be annulled after the course of many years, and diligences founded upon them, if it could be alleged, that one or two of the quorum were nearly related to the party, which would render men's rights, and the effect of decreets, uncertain ; and, in this case, the mean of probation having failed by the Lady's death, if the decret fall, the debt is lost.

It was *replied* ; The act of Parliament doth not only provide, that Judges in that degree may be declined, but that they shall not sit or vote in the cause of their near relations. And though, for the favour of commerce, such decreets may stand good to sustain legal diligence upon them, in so far as they can afterwards be astructed or made up ; yet it were against all reason, that such decreets should be unquarrellable, or sustained to instruct a debt. It imports nothing, that the mean of probation is now failed, if the defender be reponed ; because it was the pursuer's fault, to pursue before an incompetent Judge. *2do*, The Lady who was decerned, did, in her own lifetime, call the decret in question, by suspension and raising reduction. *3tio*, There is no inconvenience to question the decreets of the Lords of Session, or any other judicature, if pronounced by near relations ; because, if a decret be upon compearance, *primus actus judicii, est judicis approbatorius*, and the incompetency cannot afterwards be objected ; and a decret of the Lords in absence may be called in question by reduction, especially if it be only pronounced by a single Ordinary of course, as decreets in absence do pass *periculo petentis*.

' THE LORDS sustained the defence ; and found, That the decret being in absence, and pronounced by the pursuer's uncle, the debt must be otherwise instructed, than by holding the defunct as confessed.'

Fol. Dic. v. 1. p. 231. Dalrymple, No 14. p. 17.

NO II.

A decree being in absence and pronounced by the pursuer's uncle, it was found, that the debt must be otherwise instructed than by holding the defender (who was now dead), as confessed.

1706. *July 17.*The TOWN TREASURER of DUNBAR *against* JEAN PRINGLE, Relict of GEORGE RUTHERFORD, Merchant there.

No 12.

Bailies of a burgh competent to judge concerning debts due to the burgh.

JEAN PRINGLE relict of George Rutherford raised advocacy of a process commenced before the Bailies of Dunbar, at the instance of their Treasurer against her as representing her husband, for payment of a debt due by him per bond to the pursuer, upon this ground; That the action was for a debt resting to the Town treasurer upon the Town's account, and the Magistrates, who are administrators of the public stock of the burgh, could not judge in a cause concerning the subject of their administration, for which they are accountable; no more than a tutor can be judge in his pupil's cause.

THE LORDS repelled the reason of advocacy, and remitted the cause: There being an express act of Parliament allowing deputes to be judges in the principal's causes; and the Bailies are but the Town's deputies, and may competently judge upon debts due to the Town. Nor doth the case of a tutor or curator meet; these being reputed as parties themselves; whereas magistrates of a burgh are not so considered in the concerns of the community.

Fol. Dic. v. i. p. 230. Forbes, p. 124.

1711. *January 12.*PATERSON *against* The TOWN of EDINBURGH and JOHNSTON.

No 13.

In a process against a burgh, concerning a contract made with them, a declinator given in against one of the Lords, as being uncle to him who was town treasurer at making the contract, though now *functus*, was repelled.

THE Town of Edinburgh being in great debts, contracted on many public accounts, our Kings, from time to time, for supporting the metropolis, granted them an imposition of two pennies on every pint of ale brewed and imported within their precincts; and in 1693, King William, with advice and consent of Parliament, renewed this gift for 15 years and longer, but so as it should not exceed 30 in all. There being 13 years of this imposition yet to run, they enter into a transaction with Mr William Johnston of Sheines, Mr William Bogle and others, by which they were to assign them to the benefit of the said gift, on their engaging to pay the sum of L. 530,000 Scots, being the town's debt, and to recover and report sufficient discharges thereof in that 13 years time yet to run of the gift. This agreement taking vent before it was signed, Mr Alexandre Paterson, Bailie Gordon, and several other burgesses, applied to the town council, and offered L. 20,000 Scots more, and took instruments at the council-house door, in regard access was refused them; and finding Mr Johnston and his partners preferred to them, they raise a process of reduction and declarator against the Magistrates, and their tacksman foresaid, calling for production of the foresaid rights, to be declared void, unformal, partial and illegal; and that

they, as the highest offerers, ought to be preferred, as being most to the advantage and interest of the town.—*Alleged*, The pursuers had no title nor interest to call the Magistrates to an account for this act of their administration, seeing, by the gift and act of Parliament, the imposition is granted to the Magistrates and Town Council, as representing the whole community ; and being given for paying the town's debt, it certainly empowers the Magistrates, to ingather and apply it in the way most suitable to the end for which it was given ; and it bears an express clause, that they may collect it termly, weekly, monthly, or otherwise, as they see fit ; which puts it in their arbitrament, either to manage it by way of collection, tack, assignation, or roup. There is indeed a restraint upon them in the appropriating clause, that they shall apply singly for payment of their debts, and that at the sight of some of the Privy Council, &c. ; but that relates only to the case of misapplication, and nowise affects the clause anent their management and administration, which is left absolutely free, and in their discretionary power, as circumstances shall direct them ; and are nowise bound up to expose it to a roup ; and think they have made a much better choice in preferring Mr Johnston and others already much versant and known in that business, and who have shown much tenderness toward the brewers ; and *esto* the pursuers offer were greater than the town's assignee's, yet all being weighed, it will truly be found to be less ; for they not only undertake to sink the town's whole debt, but principal sums and annualrents, with their ministers stipends, and two French ministers, during these 13 years ; so it is every way better than any thing offered by these pursuers, which was only a rash and inconsiderate act of envy and emulation against their neighbours.—*Answered*, Their title to pursue can never be quarrelled ; for they have a double interest ; *first*, as burgesses, who being a part of the community are concerned to see to the right administration of the common good, and so much the more that if it should be deficient in paying the town's debt, their houses would be *subsidiarie* liable to make it up ; *2do*, As the highest offerers ; and though the Magistrates might have kept it under collection, yet being resolved to lay aside that mode of ingathering, there was no other left them but to expose it to public roup, and not by such barefaced partiality to prefer them who offered least. And in the process against Sir Andrew Ramsay about the Provostry in 1673, the Lords sustained the citizens interest as sufficient to quarrel the election, and found it *actio popularis* ; and if it were not for this check, Magistrates might malverse and do what they pleased. And though the oversight was committed to the Privy Council, the Lords of Session as *boni viri* come in their place. And they do not quarrel the paction in so far as they are to pay the town's whole debts in that space, but that the town has refused a considerable surplus to augment their revenue, only to gratify private men. And the ease of the brewers is but a sham pretence, for they would have been as kind as ever these men have yet shown themselves to be ; and these are only amusements to cover their bad designs.—THE LORDS considered there was a great difference betwixt the ad-

No 13.

ministration of that impost, and the misapplication of the money. In the last case, the citizens might have an interest to call the Magistrates to an account, but not in the first, where they are invested with a discretionary arbitrament to manage to the best advantage they think fit. As also, there was a disparity betwixt the Magistrates setters, and the assignees who *bona fide* entered into a contract with the town, by which there was a *jus quesitum* to them, which could not be taken away by others offering more; for however that might affect the Magistrates, it could not touch them, especially seeing, that though it be the time of war, and fear of infection and dearth, and that the consumption is now less in Edinburgh by the Union, there being neither Parliament nor Council now, yet they had taken their hazard of famine, dearth, pestilence and war, and renounced the craving any abatement on these accounts.—THE LORDS refused to sustain process at these pursuers instance, as having no sufficient title to quarrel the way and method of their administration of that gift, as being left to the Magistrates arbitrament and discretion; but did not determine what interest citizens might have to question misapplications; and they thought the tacksmen in a stronger case by their *jus quesitum*, which could not be taken from them. In this case a declinator was given in against one of the Lords, That he was brother-in-law to Gavin Plumber, who was Town Treasurer at the time of this agreement, and one of the contractors; but this being only *ratione officii*, and as an administrator, and now out of place, they found it did not fall under the act of Parliament anent declinators of judges.

July 27. 1711.—THE cause mentioned *supra*, 12th January 1711, Paterson *contra* the Town of Edinburgh was advised, and the declinator there proponed against one of the Lords being of new given in, and reasoned, they divided equally; and the President by his vote rejected it.

Then the LORDS entered on the cause; and it being stated whether the Town was obliged to set their impost by a roup only, or might do it by way of assignment, it carried by a plurality of seven against six, that by act of Parliament in 1693, giving it, they were at liberty in the managing and administration of it, and not tied precisely to expose it to a roup. Whereupon Mr Paterson instantly protested for remèd of law to the British Parliament. See APPENDIX.

Fol. Dic. v. 1. p. 231. Fountainhall, v. 2. p. 625. & 667.

1712. January 31.

CALDER *against* OGILVIE.

No 14.

In a question, whether one of the Lords might be declined in a cause where one of the parties had married his niece?—THE LORDS found that he might be declined in a cause carried on immediately by his niece, but not in her husband's concerns that were not derived from her.

Fol. Dic. v. 1. p. 230. Fountainhall.

* * * See This case, No 12. p. 197.

DEFORCEMENT.

1541. December 19.

A. against B.

No 1.

THE tenant that deforces the laird's officer forfaults his tacks, and tynes all his moveable goods that are within his jurisdiction; and this pain pertains to free tenants, and feuars baith of spiritual and temporal Lords.

Fol. Dic. v. 1. p. 231. Sinclair, MS. p. 5. No 7.

1561. February 28.

ABBOT of Kilwinning against TENANTS.

ANENT the action persequit be the Abbot of Kilwinning against certain tenants having teinds pertaining to his benefice, for deforcing of the King's officer, sent be the said Abbot with the King's letters, to poind the said tenants for the teinds foresaid; it was *alleged* be the said Abbot and officer, That the said tenants, and everie ane of them deforced the said officer in the execution of his office, and forcibly took frae him certain goods poindit be him for the cause foresaid.—It was *answerit* be ane of the said tenants, That he did na wrang in stopping the said officer to mell or take away his guidis, but he would hold and relieve the said guidis with charge of law, because he had made payment of the said teinds to the said Abbot, upon the whilk the letters were raised, and poinding made be the said officer; whilk allegiance was fund relevant be the LORDS, and admittit to the probation of the said tenant; and likeways it was *alleged* be ane uther of the said tenants, That he did na wrang in withholding of his goods, and stopping the said officer to take the same, because the goods that were tane be the said officer were drawing oxen furth of the pleuch, and he had other sufficient goods anew poindable, as he shewed to the said officer; whilk allegiance was also fund relevant be the said LORDS, and admittit to the said tenant's probation.

No 2.

A libel of deforcement was repelled, because a tenant against whom it was raised, alleged that he had made payment of the debt upon which the letters were raised, which was admitted to his probation.

Fol. Dic. v. 1. p. 231. Mailand, MS. p. 133.

No 3.

A poiding may bestayed, either by a party pretending to have right to the goods, and offering to make faith thereon, or by a landlord for his hypothecc, if security is not given for his rent; but these allegiances must be made at the time of stopping the poiding, otherwise they will not defend against the deforcement.

1628. February 1. L. HALKERTON *against* KADIE and GRIEVES.

IN an action of deforcement, L. Halkerton *contra* Kadie and Grievies, tenants to the L. Benholm; THE LORDS sustained a bond of L. 80 of principal sum, and 40 merks of penalty, albeit only subscribed by one notary, and found it not to be a matter of importance, which required to be subscribed by two notaries, albeit the penalty, counted with the principal sum, made it to exceed L. 100; seeing they had respect only to the principal sum of the bond, and the penalty was but an accessory obligation; and because the poiding deduced against the debtor of this bond, for the execution whereof this deforcement was pursued, was begun to be executed before the rising of the sun, as the defender alleged, whereby he *contended* that act to be unlawful, and that therefore he might justly impede the same; albeit at the time when the impediment was made, the pursuer *answered*, That the sun was up and risen; at which time he *replied*, It was not lawful to make a deforcement, although the act of the execution and poiding was begun before the sun rising, which poiding was deduced in the month of June. This exception, nevertheless, was found relevant; for they found, That as no judge could begin and enter to sit in judgment before lawful time of day, and before the rising of the sun, no more could execution be made by officers upon sentences at such times; also they found, That deforcements could not be elided by any allegiance, propoing the goods poided to pertain to another person than to the debtor from whom they were poided, except that either that person's self, to whom they were alleged to pertain, or some other in their name, had compeared at the poiding, either upon the ground, or at some other time, before the act was complete and ended, and offered to make faith that the goods pertained to the other person; which being done, they might have stayed the poiding without danger of deforcement, otherwise not; for the offering to prove against the pursuit of deforcement, that the goods pertained to another, without the offering to make faith at that time of the poiding, was not sustained as relevant to purge the deforcement.—Also the LORDS found that allegiance not relevant to stay deforcement, viz. that the defenders, being servants to L. Benholm their master, who was heritor of the land out of the which the goods were poided, might lawfully stop the poiding for security of their master's farm, addebted for that year to him, by the debtor of that sum for which the poiding was executed, and which debtor was tenant to him also, and in which the master would have preference for his farm before other creditors. This allegiance was repelled; because, at the time of the poiding, and staying thereof, neither the master nor any other in his name, made mention of that cause of the stopping of the poiding, which, if it had been done, the party might have offered surety for the master's satisfaction, and so proceeded to his execution; and if that security had not been granted, the poiding might have been impeded without danger of

deforcement ; but no such intimation being then made for the master's farm, the LORDS found, That the deforcement could not be now elided, by proponing now in this place upon the master's right, which was then omitted to be mentioned at the time of the execution, and was now only alleged, and offered to be tried to be a just debt.

No 3.

Act. *Advocatus Hope.*

Alt. *Stuart.*

Clerk, *Gibson.*

Fol. Dic. v. I. p. 231. Durie, p. 338.

1685. *March.*

ROBERT HARSE *against* FORK.

No 4.

FOUND, that a messenger might be deforced in the execution of a pointing of goods in a shop, when he had not his blazon at the time, though he was known in the place. But there was some speciality ; for he, before himself appeared, sent a man into the shop as his assistant, whom the people turned out again, and conveyed away some goods.

Fol. Dio. v. I. p. 232. Harcarse, (DEFORCEMENT.) No 412. p. 110.

1697. *December 30.*

LORD KINNAIRD *against* JOHNSTON of Westerhall and DOUGLAS of Kilhead.

No 5.

I REPORTED the Lord Kinnaird against Johnston of Westerhall, and Douglas of Kilhead, for deforcing a messenger in the execution of a caption against Bernard Ross. The defences were, the instrument of deforcement was null, because, *imo*, It did not bear the messenger displayed his blazon, and so I was not bound to acknowledge you for one ; *2do*, It does not bear you shewed the caption, and when you was required, you only produced a letter from my Lord Kinnaird's Chamberlain, employing you to search for the said rebel ; and it was a great and secret virtue in the caption to work at that distance, as the sympathetic powder does ; and it is *licita resistentia* in any of the lieges to rescue a rebel out of a messenger's hand who wants a caption ; for, in so far he acts without authority, *et tanquam prædo*.—*Answered*, He opposed the execution, bearing, that after he had apprehended the rebel, he touched him with the wand of peace : he disarmed him of his sword, and delivered him to his apparitors and associates, which speaks both his acquiescence, and that all things were legally and formally done ; and, for showing his caption to those gentlemen who came after he was his prisoner, he was not bound to show it to them ; neither is it always safe for a messenger to do it, for several times it has been torn by the rebel, or carried away by others ; and here Ross, the prisoner, neither controverted his being a messenger, nor his having the caption, but submitted ;

The Lords found, that a messenger apprehending a man for debt was not bound to show his blazon, till he had touched him with the wand, and therefore, found the omission of that to be no excuse of deforcement.

No 5. and he was not bound to satisfy others.—THE LORDS, before answer, allowed either party to adduce what probation they can, whether the messenger had the caption on him at the time, and if a sight of it was required, and if any violence was offered, and how far the rebel acquiesced or sent for help, and upon any other points, for clearing if there was a deforcement or not.

January 18. 1699.—THE LORDS advised the mutual probation led in the deforcement pursued by the Lord Kinnaird against Sir James Johnston of Westerraw, and Douglas of Kilhead, for rescuing one Bernard Ross out of the messenger's hands, mentioned 30th December 1697. Several questions occurred, Whether he was bound to show his blazon; and it was thought not, till he had apprehended the rebel, and laid on him the wand of peace; for to show it before, were to discover himself to be a messenger, and give the rebel opportunity to run away: And some thought there might be danger in giving the caption out of his hand, for in these hubbubs they might tear it. But the great debate ran here, if Westerraw, as Stewart-depute of Annandale, might not dismiss the prisoner, where he found he was illegally apprehended, and no caption shown. Some argued, he might have detained them both till the matter was tried, and needed not grant his concurrence to the messenger; but he exceeded his duty in setting the prisoner at liberty.—THE LORDS abstracting from these points, after reading the depositions, found the deforcement sufficiently proven. Some moved to have the witnesses re-examined; but this was laid aside, and the cause determined *ut supra*.

Fol. Dic. v. 1. p. 232. Fountainball, v. 1. p. 807. v. 2. p. 36.

See APPENDIX.

DELINQUENCY.

SECT. I.

Parricide.

1674. February 3. GEORGE OLIPHANT against PATRICK OLIPHANT.

MR JAMES OLIPHANT having slain his mother, and being convened before the Justices for that crime, he was decerned fugitive, and denounced. Mr George Oliphant, his brother, pursues a declarator upon the 220th act, Parliament 1594, declaring, That murderers of their parents, and their posterity *in linea recta*, shall be disinherited, and the heritage shall pertain to the next collateral and nearest of blood, so that Mr James the murderer ought to be disinherited in his right, and his right declared void, and Mr George his brother might be found heir to his father's estate. It was *alleged* for the defender, That the libel is not relevant; because, by the statute, it is expressly required, that the murderer be convicted by the inquest; and his being declared fugitive cannot legally prove the crime, neither can it reach any further than the escheat and liferent of the denounced. It was *answered*, That there is no reason that the murderer should have advantage by his flight, but all having been done against him that law could do, it is equivalent, seeing the crime was notour, as if the murderer had died immediately after the act, and there is no reason that thereby he should escape.

THE LORDS found, that seeing the statute is *stricti juris*, it could not be extended, unless the murderer had been convicted.

Fol. Dic. v. 1. p. 232. Stair, v. 2. p. 261.

* * * Gosford reports the same case :

IN a reduction at the instance of the said Mr George, upon the 220th act of Parliament 14th, K. Ja. 6. to hear and see it found, that Sir James Oliphant

No 1.
An heir was found not to be excluded from his father's heritage, because he was declared fugitive for murdering his mother.

No 1. having committed the crime of parricide, in killing of his mother, all his heirs *in recta linea* were incapable to succeed to his estate, and that the same should go to the next collateral heir, and nearest of blood, and so belongs to the pursuer, who was brother to the said Sir James, who ought to be preferred to all the heirs of Sir James *in recta linea*. It was *alleged* for Mr Patrick, and the creditors of the said Sir James, and of his eldest son, who was fiar of the said estate, that the declarator could not be sustained, because, by the foresaid act of Parliament, whereupon his declarator is founded, it is to take place only in favour of the collateral line, where the committer of parricide was convicted by an assize, whereas no such thing here can be alleged, the said Sir James never having compeared, but being denounced to the horn for not compearing to underlye the law. It was *replied*, That his being denounced for not compearing to underlye the law was equivalent to the verdict of an assize, and ought to operate the same effect, otherwise it should be in the power of all guilty of the said crime to elide the foresaid act of Parliament, by their withdrawing, which is against all reason, and the meaning of the act of Parliament. It was *duplied*, That Sir James being long since dead, and his creditors infest in his estate for their security, they cannot be comprehended under the penalty of the act of Parliament, unless it could be subsumed *in terminis*, that Sir James was convicted before he died, and *in pœnalibus et odiosis*; the same cannot be supplied by equipollency or presumptions, but the declarator must subsume in the precise terms and words of the act.—THE LORDS did sustain the defence; and fand, that the declarator being of so high a nature as to disinherit all that were to succeed *in linea recta*, it ought to be libelled in the express terms of the act of Parliament, which is a penal statute; and that Sir James being denounced to the horn, did thereby only escheat his moveables or liferent, but could not, for non-compearance, forefault his lands and inheritance for himself and his heirs of line: As likewise found, that this pursuer being now, by the death of the heirs of line, the next and only heir that could succeed, that this declarator was only sought by him that he might frustrate all the creditors of Sir James, and his eldest son Mr James, which was most unfavourable, and therefore they assolizied from the declarator.

Gosford, MS. No 683.

S E C T. II.

Perjury.

1695. November 12.

THOMAS YEAMAN in Leith against JOHN ROGER Writer.

THE LORDS advised the concluded cause, Thomas Yeaman in Leith against John Roger writer, who being charged on a ticket of L. 20 Sterling, suspended, on this reason, that he offered to prove, by Yeaman the charger's oath, he was paid of L. 15 Sterling of it. And he having deponed *negative*, except as to L. 54 Scots, Roger afterwards, on a bill, gets a diligence to produce a bond of corroboration he had given him only for L. 5 Sterling, as resting of a greater sum: And it being produced, at the advising, he made use of it to controul and redargue his oath, together with a bond of presentation, &c.—THE LORDS found the charger's oath was the only rule by which they behoved to judge; and found it did not prove the reason of suspension; and therefore decerned, except *quoad* the sum acknowledged; seeing the exception of perjury does not elide the debt, but only founds a criminal pursuit; and for expiscating where the knavery and unfair dealing lay, recommended to my Lord Rankielor, who had formerly heard the cause, to try the same, and report.

Fol. Dic. v. 1. p. 232. Fountainhall, v. 1. p. 677.

No 2.

The exception of perjury does not elide the debt, but only founds a criminal pursuit.

S E C T. III.

In what cases a Procurator Fiscal may Prosecute without Concourse of the Private Party.

1738. July 25. GILMOUR against The PROCURATOR-FISCAL of Linlithgow.

No 3.

FOUND, That a procurator-fiscal could not pursue *ad vindictam publicam*, notwithstanding the *dissimulatio* of the private party, the crime not having been of a public nature, and which required punishment *ad vindictam publicam*.

Fol. Dic. v. 1. p. 232. Kilkerran, (DELINQUENCY) No 2. p. 156.

* * * Lord Kames reports the same case :

No 3.

IN a suspension of a decret, obtained at the instance of a Procurator-fiscal, for a riot, notwithstanding of a disclamation made by a private party, the LORDS made no doubt but that a Procurator-fiscal may pursue *ad vindictam publicam*, and were clear, there is no parallel betwixt the case of a Procurator-fiscal of a Commissary-court, in the case of scandal, and of a Procurator-fiscal suing for a breach of the peace ; that *dissimulatio*, abstractedly considered, is not a good answer to a Procurator-fiscal pursuing *ob vindictam publicam*, seeing he may pursue both parties ; but then, upon perusing the proof, they found, that this was but a drunken squabble, in which the public is very little concerned, and that it was officious in the Procurator-fiscal to intent a process in such a case, and therefore suspended the letters *simpliciter*.

Fol. Dic. v. 1. p. 232.

No 4.

1738. November 8. FERGUSSON *against* The PROCURATOR-FISCAL of Carric.

ALTHOUGH a libel, at a Fiscal's instance, upon a crime of a public nature, was only for his interest, without bearing for himself and his interest, he was allowed to carry on the process, notwithstanding the disclamation of the private party.

Kilkerran, (DELINQUENCY) No 3. p. 156.

SECT. IV.

Scandal.

1708. December 31.

MR CHARLES JAMES, late register of the North British ships, *against* RICHARD WATKINS, Stationer in Edinburgh.

No 5.

A libel of scandal should be special as to persons, time, and place. The giving

MR CHARLES JAMES being turned out of his employment by the Commissioners of the Customs, upon information given to them, that he had drunk heartily to the Pretender's health, under the name of K. James 8. about the time of the late designed invasion, he raised a process of scandal before the Commissaries

of Edinburgh, against Richard Watkins, as having been the informer against him, and cited the Commissioners of the Customs as witnesses. Which action was advocated by Watkins from the Commissaries, upon this ground of iniquity, that they admitted the libel to probation, reserving the consideration of the import till advising; albeit the libel was altogether general, without condescending upon persons, time, or place; and the delating a person for a crime to his master, or such as had power over him, could never be the ground of a process of scandal, especially if it was a crime against the commonwealth, where there is no *animus injuriandi*.

Answered for James; *1st*, The libel is not altogether general, the injury being specially and circumstantially libelled; and as to persons and place, it bears, that the defender had defamed the pursuer to several persons of quality, whose names and characters should, if required, be condescended on, and the suppressing thereof was not to take advantage of the defender, but to shun offence to the Commissioners. *2dly*, The Commissioners are no ways challenged for their management in the disposal of their servants, but are only required to bear testimony of the false aspersion cast upon James by Watkins, who is not their servant, and ought to be punished as a false informer.

Replied for Watkins; *1st*, By the libel's being general, and not circumstantiate as to persons, time, or place, the defender is excluded from the mean of exculpation, by alleging *alibi*, &c. *2dly*, If the Commissioners of the Customs cannot receive private complaints of their own officers, without subjecting the informer to a process of scandal, wherein they must be cited as witnesses, as the pursuer has done, their servants may safely malverse; seeing no man will dare to table an accusation from the fears of a process of scandal.

THE LORDS found the libel of scandal ought to be special with respect to persons, time, place; and found, that giving the Commissioners of the Customs private information against any person employed under them, is no relevant ground of a process of scandal; and that these Commissioners cannot be convened as witnesses to depone upon such private information, and remitted to the Commissaries to proceed accordingly.

Fol. Dic. v. 1. p. 232. Forbes, p. 293.

* * * Fountainhall reports the same case :

CHARLES JAMES being register to the North British ships, put in by the Commissioners of the Customs, there is an information given in against him to them, bearing, that he, in company with sundry other Jacobites, had drank King James the VIII.'s health, whereupon he is turned out of his office, as dissaffected to the government. He suspecting that Richard Watkins, the Barons of Exchequer's stationer, had given in this delation against him, raises an action of scandal and defamation before the Commissaries of Edinburgh against Wat-

No 5.
private information to the Commissioners of the Customs against any person employed under them, is not relevant to found a process of scandal; nor can these Commissioners be convened as witnesses to depone on such information.

No 5.

kins, as having wronged him in his good name, means and estate, and therefore craving reparation and punishment; and sought a diligence against the Commissioners of the Customs, as witnesses, to depone that Watkins brought them that false accusation against him: which being granted, Watkins presented a bill of advocation to the Lords, upon these reasons, that the Commissaries had committed iniquity in sustaining a scandal, where there was none; for the private delating of a person for a crime to his master, who had power to remove him from his service at his pleasure, can never be the ground of a process of slander, especially not being published nor spread abroad, but only told to the parties concerned in private; for what hinders a friend to acquaint me to be on my guard against such a servant, as dangerous and unfaithful. Shall this lay a foundation for the servant to pursue the informer for scandal, and lead the master as a witness to prove it? This would discourage all discoveries of malversation, and embolden either the public or private servants to be guilty of the highest misdemeanours; for, if any dare table an accusation against me, I shall immediately arraign them for defamation and scandal, and lead the masters as witnesses to get them punished, which is of the highest consequence to invite and embolden servants to malverse *impune*. *Answered*, The Lords are not judges to scandal and actions of injury *in prima instantia*; but only the Commissaries, who if they do wrong, the Lords can only rectify in a reduction and suspension; and Mr James the pursuer has no other design than to vindicate his honour against that malicious aspersion; neither doth he grudge his losing that lucrative post, as that he is refused to be employed in any other station so long as he lies under character of a disaffected person; and whatever inconveniency may be urged of emboldening bad servants, the danger lies greater on the other side, to discourage private and clandestine defamations, wherein a man's reputation is murdered under trust, and he knows not whence it comes. Such informers, sculking under the covert of secresy, are the very firebrands and incendiaries of human society, and called by Tacitus, *delatores pessimum hominum genus*; and, by such hidden practices, the most innocent person may suffer.—THE LORDS considered that a scandal implied a public venting and spreading of the same, and that the informing the Commissioners of the Customs of one of their servants' misbehaviour could not make up a libel for scandal, and therefore remitted the cause back to the Commissaries as the most proper competent judges to such actions; but with this express direction and instruction, that such private information given was not relevant to found a process of scandal.

Fountainball, v. 2. p. 477.

No 6.

The editor of
a news-paper
fined for ex-

1733. July 3. M'EWAN *against* MAGISTRATES OF EDINBURGH.

THE author of the Edinburgh Evening Courant, in publishing the news of a mob that happened at the West Kirk, about settling a minister in that parish,

though they kept within the bounds of truth, yet dressed up the story in colours very disadvantageous to some of the magistrates of Edinburgh who were upon the spot attending the settlement, insinuating several sharp reflections against them. Among others, several queries were adjected, such as 'it is submitted to the judgement of mankind if there was much more order, caution, and discretion observed by those who took upon them to compose the tumult, than even by the mob itself. And it may be justly queried, whether the ordering out the city-guard, without the bounds of the city, to act a part in this affair, and whether imprisoning Fleucher the beadle were legal? whether the town-guard firing, killing, and wounding so many persons, without reading the proclamation, as the law directs, be not a great crime? and whether the captain of guard's beating Mr M'Vicar's children and servants was not a manifest riot, if not hamesucken?' This matter having been brought before the Lords in the shape of a reduction of an inferior decreet, in which the news-writer had been fined in L. 10 Sterling; it was *pleaded* for him, That news-writers, by inveterate customs, are tolerated to publish historical accounts of transactions foreign and domestick, whether reflecting honour or reproach upon the actors. *Answered*, Libels of scandal are prohibited in whatever shape they come out; the above paragraph is not in the spirit of a cool news-writer, but bears evident marks of rancour and resentment; and supposing the magistrates to have been in the wrong, the parties injured, or those employed by them, ought not to inflict punishments at their own hands, while there are laws in being, by which they may be redressed. For this reason it is that *veritas convicii non excusat*. THE LORDS assoilzied from the reduction.

Fol. Dic. v. 1. p. 233.

No 6.

pressions injurious to magistrates, relative to their conduct in suppressing a riot.

1752. February 29. ELIZABETH SYMMOND *against* JEAN WILLIAMSON.

CERTAIN Port-Glasgow ladies and gentlemen, having, after the example of their betters, convened in the house of John Allason baker, for a dance; the conversation happened to turn upon the said Elizabeth Symmond, who was not present; and Allason having dropped certain expressions that gave Mrs Scott ground to think, that he thought said Elizabeth handsomer than her, Mrs Scott thereupon said, Did he compare Symmond to her? and fell into a passion, and gave her very opprobrious names, saying, that (Fleeming) her father had been a footman, and that her mother had kept a bawdy-house, and that if she did not cuckold her husband, it was not her fault, &c.

But, upon Allason's saying, that he would report this to Mr Fleeming, Mrs Scott said she blamed him, for he had put her in a passion; and added, what she had said of Mrs Fleeming was all lies, and that she had no ground for saying it; and, in a few days thereafter, she was also heard to repent of her having

No 7.

Defamatory expressions immediately repented of, slightly punished.

No 7. uttered the said expressions, and to wish Mrs Fleeming might be reconciled to her.

Allason was nevertheless indiscreet enough to report to Mrs Fleeming the defamatory expressions which Mrs Scott had uttered; whereupon Mrs Fleeming and her husband brought a process of scandal against Mrs Scott before the Commissary of Glasgow, concluding for damages and a fine, and proper palinode, for that the expressions were scurrilous and malicious; and the defender, along with her answers, gave in a fresh declaration, that she was sorry for the expressions she had uttered, that she had no just cause for them, but was moved by passion.

The Commissary, upon advising the proof, which he had allowed before answer to either party, and which came out just as is above related, 'Assoilzied the defender from damages and fine, and ordained her to compear on a day and hour certain, in the house of the said John Allason, and there, in the presence of the bailie of Port-Glasgow, and of the persons who were present at uttering the expressions, or others whom the pursuer might call, acknowledge and declare she had no just cause for the said expressions, and beg the pursuer's pardon, all under the penalty of L. 5, to affect the defender's part of her husband's executry, if incurred.'

The pursuer presented a bill of advocation, which the Ordinary, upon advising with the Lords, 'refused;' and the pursuer having reclaimed, 'the petition was refused without answers.'

Fel. Dic. v. 3. p. 178. Kilkerran, (DELINQUENCY) No 17. p. 165.

1763. January 28: JOHN FINLAY *against* RUDDIMAN.

No 8.

The publisher of a news-paper was condemned in L. 15 Sterling as damages to a gentleman who thought himself pointed out by an indirect and unguarded expression.

IN the Edinburgh Caledonian Mercury, dated 17th September 1760, the following paragraph was inserted upon the authority of an anonymous letter from Glasgow: 'Saturday one John Finlay a shoemaker was taken into custody for committing a rape on a servant-maid belonging to one of our present magistrates, which, with other bad usage, has occasioned her death. He is a worthless fellow, and it is hoped will receive a punishment adequate to his many atrocious crimes.' The publishers of this paper soon being convinced that their information was false, published the following article in their paper, 27th of December 1760: 'We have reason to believe, that several paragraphs of the letter from Glasgow, inserted in our paper of the 17th, are groundless; particularly that concerning John Finlay shoemaker. This letter appears to us to have been wrote with a malicious design. We are sorry we took any notice of it; and are making every inquiry that can tend to a discovery of the imposition. In the mean time, in justice to Mr Finlay, we can assure the public, that the above mentioned paragraphs are void of foundation.'

John Finlay merchant in Glasgow, was a member of the incorporation of shoemakers in Glasgow; and in that character carried on an extensive manufactory of boots and shoes. This gentleman imagining himself to be pointed out by the paragraph first mentioned, brought a process against the publishers for damages. It was clear that there was here no *animus injuriandi* with respect to the pursuer; because *1mo*, The designation of John Finlay shoemaker could not point out the pursuer, who never carried that designation till he thought proper to assume it in the present process. *2do*, The paragraph bears that Finlay the shoemaker was taken into custody, which was not the pursuer's case. And *3tio*, The defenders could have no intention to defame the pursuer their good friend, with whom they had a constant correspondence, by sending him weekly their news-papers.

The pursuer *urged*, *1mo*, That the defenders must have had an *animus* to defame some person under the name of John Finlay shoemaker, and being *versantes in illicito*, that they must be liable for all consequences. The *answer* was, That they had no *animus* to defame any person, but barely to state a fact as an article of news.

It was *urged*, in the *next* place, That they ought to insert no article but where their information can be depended on. It was obvious to *answer*, that the purpose of a news-paper is to publish facts wherever happening; and such a paper must be extremely defective, if no intelligence be admitted but what proceeds from unexceptionable authority; for the profits of a news-paper will not defray the expense of establishing faithful correspondents in every corner.

When this cause, which concerns the liberty of the press, was advised, it occurred as a matter of no slight difficulty to ascertain the boundary betwixt that liberty which must be indulged to a news-writer, in order to inform or divert the public, and that licentiousness which, without any evil intention, may do mischief. One thing is clear, that the writer of a news-paper is not privileged to communicate to the public any private transaction, however certain his information may be. He must confine himself to what is publicly transacted, and what must spread, of course, without a news-paper; in which case a news-paper has no other effect but to quicken the intelligence. The article challenged is of that nature; for nothing can be more public than a man's being taken into custody in a great city to be tried for a crime. News-writers, however, are not privileged to defame a person by characterising him as a worthless fellow, deserving punishment adequate to his atrocious crimes. This was certainly rash and unguarded, and the less excusable, that such virulent expressions are by no means necessary for carrying on the purpose of a news-paper.

'THE LORDS accordingly found the defenders liable in damages, and modified the same to L. 15 Sterling.'

Fol. Dic. v. 3. p. 179. Sel. Dec. No 204. p. 270.

No 9.

Found in conformity with the above.

1776. *June 22.*JARDINE *against* CREECH, &c.

JARDINE schoolmaster at Bathgate, prosecuted Messrs Creech, Elliot, and others, as publishers of the Edinburgh Magazine and Review, for a defamatory paragraph inserted in their magazine for March 1774, bearing, 'That a letter from Bathgate, signed J—— D——NE, against a ball lately held at Whitburn, is received; but is totally void of merit. It exhibits alternate strokes of superstition and blasphemy. The author, at the same time, possesses not any talent for composition. He writes with a total contempt of all the rules of grammar. It gives us pain to learn, from the letter which accompanied this reprehensible and unworthy essay, that it is the production of a schoolmaster, and that it is approved of by a popular clergyman. At any rate, it would be improper to publish a paper, tending to foment dissention among neighbours, and to wound the character of respectable persons of both sexes.' The pursuer denied that he had ever sent such a letter or composition, or knew any thing about it; but *urged*, that being pointed out by so many marks or characters, which could apply to nobody but himself, his character and reputation had deeply suffered, and of course, his professional emoluments were either actually impaired or endangered. The defenders *urged*, That they had no intention to injure the pursuer, whom they did not know; they only stigmatized the writer of an unworthy and blameable composition: There was nothing in the paragraph that pointed out this pursuer. The letters might have applied to John Donne or James Downe, but could not apply to the pursuer; for commoners and private men never sign by their surnames alone. Besides, the interest of literature requires that there should be a freedom of criticism, and their publication being a review, they plead the privilege of all their brethren.—THE LORDS found damages and expenses due, and modified the same to fifty guineas.

Fol. Dic. v. 3. p. 179.

No 10.

Expressions injurious to a third party, uttered by a professor, in a private discourse with a few of his students, found to be actionable.

1787. *June 13.*JOHN ANDERSON *against* WILLIAM RICHARDSON.

MR ANDERSON, one of the professors in the university of Glasgow, raised an action before the Commissary of the district, against Mr Richardson, another professor in the same university, libelling, That the defender had, in private, harangued three of the students with false and injurious invectives against the pursuer's character; affirming, in particular, that the latter was 'a bad man, and a detestable member of society.'

The Commissary, 'as it was not said, or offered to be proved, that any other persons than the three students themselves were present, found, That it would be unbecoming, and of bad example, to call students in that situation as witnesses in a court of law, in order to make them discover, upon oath, the pre-

'cise terms or tenor of a private admonition given to them by one of their professors; and therefore assolizied the defender.'

No 10.

The cause having been brought before the Court by advocacy, it was

Pleaded for the defender; A professor, in respect of his pupils, is like a father or a guardian. But ought the admonitions that are given under these relations, in the hours of retirement and confidence, to be made a foundation for actions of damages, such as the present? Still more 'unbecoming, and of worse example,' would it be, that the pupils should be made to assume the treacherous character of witnesses against their monitors. This action, therefore, whether considered in itself, or with respect to the mode of proof to which it refers, is equally incompetent. The charge, besides, is not relevant. The expressions in question are plainly such as it may often be necessary to use for the purpose of admonition; and thus the supposition of an *animus injuriandi* is excluded, it not being alleged that the pretended slander was disseminated. Sir George Mackenzie's Criminals, tit. 30. § 2.; Erskine, b. 4. tit. 4. § 80.; Blackstone, b. 3. chap. 8. § 5.

Answered; If the *animus injuriandi* can be proved, action should certainly be sustained, though the injury has been done in the course of private admonition, whatever be the relation between him who admonishes, and the person admonished. The expressions libelled, to use the words of Voet, *ad tit. D. de injuriis, et fam. libel.* § 20. 'Per se, et propria significatione contumeliam inferunt; hinc injuriandi animus adfuisse creditur, eique qui illa protulit probatio incumbit, injuriæ faciendæ consilium defuisse.' Nor is it enough that the calumny was not disseminated. Dissemination is not of the essence of defamation; for a person may be defamed, with as bad consequence, to an individual, as to a multitude. If, therefore, the offence itself is actionable, the admissibility of the witnesses mentioned must follow of course.

THE LORD ORDINARY reported the cause; when it was

Observed on the Bench; The doctrine of the defender is a dangerous one. Slander ought never to be allowed to pass under the disguise of private admonition.

'THE LORDS repelled the objections stated against the relevancy of the libel.'

Reporter, Lord ESKRINE.

Act. MacLaurin, Ross.

Alt. Dean of Faculty, Craig,

J. Millar, jun.

S.

Fol. Dic. v. 3. p. 179. Fac. Col. No 333. p. 512.

S E C T. V.

Stellionate.

No 11.

Granting of
double rights
punished with
confiscation
of moveables.

1505. *January 15.*

The KING against JOHN TELFER.

GIF ony man committand the crime of *stellionatus*, gevis and makis, willinglie and wittinglie, doubill infestmentis, takkis, assedatiounis, or ony alienatiounis, or dispositiounis of his landis to divers and sindrie persounis, he may be callit at the Kingis instance, and all his moveabill gudis and geir may be confiscat be his hienes for making of the samen.

Fol. Dic. v. 1. p. 233. Balfour, (DOUBLE ALIENATIONS.) No 1. p. 166.

* * * The like was found, 26th April 1513, Adam Kinghorn against John Macalister.

S E C T. VI.

Suicide.

No 12.

1610. *January 30.*

SHEARER against STIRLING.

A DECLARATOR being sought of the escheat of a man in Stirling, as alleged having drowned himself;—it was *excepted*, That the defunct's escheat could not fall by that fact, because he drowned not himself wilfully; but having given a deadly stroke, with a durk, in Stirling, to a man, and, being pursued with drawn swords, by one Lairston, guid-brother to the hurt man, and the Laird of Craignageli, he was so hardly pursued by them, that he was forced, for safety of his life, to take the water of Forth; and so, drowning by accident, his escheat could not fall.

Fol. Dic. v. 1. p. 233. Haddington, MS. v. 2. No 1767.

No 13.

The Lords
refused to sus-
tain action of
declarator of

1613. *June.*

REDPATH against ———.

IN an action of declarator of escheat, pursued at the instance of Robert Redpath, as donatar to the escheat of umquhil Marion Forrester, spouse to William

Wachop of ———, for slaying of herself;—the LORDS fand an exception relevant, founded upon her fury being qualified by the space of six months before her decease, and so she could neither incur pain in her body, nor loss in her goods, mair than she had slain a third person. Thereafter, there was an exception, *quod debita excedunt bona*, and this was repelled; and the LORDS fand, that the husband would be compelled to make the half of his goods furthcoming without deduction of his debts.

Fol. Dic. v. I. p. 233. Kerse, MS. ff. 218.

No 13.
a liferent of a person who had killed herself, she having been furiously six months before.

SECT. VII.

Forgery.

1739. July 6.

COCHRAN *against* BAR and SPENCE.

No 14.

IMPRISONMENT for life is a punishment rarely inflicted; but, in this case, a forger being banished, and ordered to be whipped once a-month, in case of his return, till occasion should offer for transporting him; he was, in case of his return a second time from banishment, ordered to be imprisoned for life, though not without expressing a dislike in general to that sort of punishment.

Fol. Dic. v. 3. p. 177. Kilkerran, (DELINQUENCY.) No 5. p. 156.

1747. February 3.

THE ROYAL BANK of Scotland *against* CORRIE.

No 15.
Forger remitted to the Justiciary without finding the actual forgery.

IN the complaint, at the instance of the Royal Bank, against Archibald Corrie, for the alleged forging the notes of the Company, the LORDS, on advising the proof, 'Found it proved, that the notes challenged were forged, and that the pannel had used the same, knowing them to be such, and remitted the pannel to the Court of Justiciary.'

THE LORDS waved giving judgment upon the actual forgery, and yet remitted as said is: But the truth is, That in the opinion of several of the Lords, there was even sufficient proof of his being the fabricator, who, otherways, would have doubted of remitting the pannel to the Justiciary; and therefore, this is not to be taken as a rule, that, in every case, one proved to have uttered

No 15. false notes, knowing them to be such, is to be remitted to the Justiciary; that matter will depend on circumstances.

Fol. Dic. v. 3. p. 177. Kilkerran, (DELINQUENCY.) No 10. p. 160.

1748. July 29.

STARK against BURNET.

No 16.

Forgery does not fall under the act 1701 as to the time for trial and bail.

WILLIAM BURNET prisoner in the tolbooth of Edinburgh, at the instance of James Stark, for the crime of forgery, having used letters of intimation in terms of the act 1701, the complainer applied by petition, craving, 'That notwithstanding said letters, he might be ordained to appear and take his trial against the — day of November next, and for that effect be detained in prison.' THE LORDS 'granted the desire of the petition, unless he should find bail for L. 50 Sterling for his appearance.'

That forgery does not fall under the act 1701 as to the time limited for commencing and finishing trial is certain, that being what the forms and time of sitting of the Court could not permit; and, as to bail, though forgery is in some cases capital, yet that depends on circumstances; for, in many cases, it amounts not to a capital punishment: Therefore, as it is of an ambiguous nature, bail is generally admitted, and rarely opposed, but is made higher or lower according to circumstances.

Fol. Dic. v. 3. p. 177. Kilkerran, (DELINQUENCY.) No 12. p. 161.

1751. November 6. & 14. JAMIESON and Others, against FORRESTER.

No 17.

Forgery and falsehood punished by the Court of Session.

IN the complaint, at the instance of John Jamieson and others, partners in the rope-manufactory at Leith, against John Forrester, as guilty of forging certain bills, which he had impignorated to them, in security of a debt he owed them; the fact came out to be of a very uncommon contrivance. He had indorsed to them six different bills; and, with respect to most of them, they were suspected to be altogether fictitious, drawn on and accepted by persons that never had a being; at least, he could bring no evidence that there were ever such persons. And the account he gave of the matter rendered that suspicion a certainty, which was, that they had accepted the bills for value; and the value was, his obligation to put effects in their hands when he should be required so to do; and, that though he had got their bills payable at a day long elapsed, he had neither seen nor heard of them since. But one of these bills was a plain forgery; it was drawn upon James Cock merchant in Crief. And such a man there was; but then the prisoner, sensible that this James Cock would improve it, alleged that this James Cock was not the person on whom the bill was drawn, but another who called himself James Cock merchant in Crief.

But as he could give no satisfying account who this other person was, it was, on the 6th of November, found, ' That this bill was false, feigned, counterfeit, and forged by the said John Forrester ; and the other bills were found false and feigned ; and the whole six bills reduced and improven, and decerned and declared to be void and null, and to make no faith in judgment.'

No 17.

And upon the 14th November, the LORDS having again resumed the consideration of the complaint, &c. ' Found the complainers entitled to their damages, amounting to L. 300 Sterling, and decerned therefor ; and declared the said John Forrester *infamous*, incapable of bearing evidence in any action or suit, or of passing on any inquest or assize, or of bearing any public trust or office ; and ordered and adjudged him to be carried back to prison, and there to remain till a day certain, when he was to be brought to the common pillory, thereon to stand bare-headed for a full hour, between twelve and one, with this inscription on his breast, *Infamous Forger, and falsifier of Writings* ; and thereafter to be carried back to prison, there to remain till an occasion should offer of transporting him to one or other of his Majesty's plantations in America, to which he was banished for ever, with the usual certification in case he should return ; and ordained the bills to be torn and cancelled in their presence, and the sentence to be recorded in the books of sederunt.'

This is a strong instance of not remitting to the Justiciary, notwithstanding forgery is found proved. Another like instance occurred in a late case, David Chalmer against John Stevenson of Dykes, and in Russell against Adie, anno 1729, *voce JURISDICTION*, that being a matter pretty arbitrary.

N. B. Although in most crimes, a pannel may lay his hand upon his mouth and plead to be assoilzied, unless his prosecutor prove his libel, there is this speciality in forgery, that a defender must support by evidence, the account he gives of the deed challenged. *Vide L. 22. C. ad L. Corn. de Falsis.*

Fol. Dic. v. 3. p. 177. Kilkerran, (DELINQUENCY.) No 14. p. 163.

1752. February 27. JAMES SMITH in Prison for Forgery, Petitioner.

No 18.
Prisoners for
forgery are
commonly
admitted to
bail.

As forgery is a crime, whereof the punishment is not always capital, the LORDS were in use, on application, to let the person out of prison on bail, for a greater or lesser sum, according to circumstances. And accordingly, in this case, Smith, who stood accused of forging certain deeds, which he made use of for extinguishing and compensating a debt of L. 80 Sterling due by him, was allowed to be liberate on his finding caution for L. 100 Sterling, being the debt, and L. 20 more.

Fol. Dic. v. 3. p. 177. Kilkerran, (DELINQUENCY.) No 16. p. 164.

1753. February 6.

DUKE of ROXBURGH and His MAJESTY'S ADVOCATE, *against* WILLIAM CHATTO,
Feuar in Kelso.

No 19.

In a criminal prosecution against one for forgery of a deed, it is not necessary to produce the deed said to have been forged.

THE defender, who holds certain lands in feu of the Duke of Roxburgh, having been extrajudicially warned to pay up some arrears of feu-duties owing by him for these lands, pretended that his Grace was debtor to him in a larger sum than that of the feu-duties demanded; for that the late Duke of Roxburgh, by a writing under his hand, became bound for himself, and his heirs, to grant a feu-charter, *gratis*, to Thomas Chatto (father of the defender), and to other feuars therein described; as also, to infest and sease them in their respective feu-lands at his own expense. The defender offered evidence to show, that the expense of this infestment exceeded the sum demanded of him in name of feu-duties; and, though he refused to produce the principal obligation above mentioned, yet he delivered, what he called a copy of it, to the gentleman who manages his Grace's affairs. A process was nevertheless brought, at the instance of his Grace, before his baron-bailie, when a procurator appearing with a mandate from the defender, pleaded the same defence. The baron-bailie ordained the defender to produce the principal obligation; and, on his refusal, decerned for payment of the feu-duties.

The Duke of Roxburgh, with concurrence of his Majesty's Advocate, raised a reduction and improbation of the above writing; in which process, certification was obtained against the defender, and the writing reduced and improved; but as this sentence could not affect the respective interests of the other feuars, in whose favour the obligation was said to have been conceived, and as suspicions of guilt in the premises appeared against the defender, his Grace insisted farther, that that principal writing was false and forged; and that the defender was actor, art and part, of forging, or of using it, knowing it to be forged.

The defender *objected* to the competency of this pursuit; and *pleaded*, 'That the law has devised sufficient security against false and forged writings, by the civil action of reduction and improbation; if the writings called for in such action be produced, the pursuer may proceed to have them improved, and if the case so require, may have the users of them punished as forgers; if the writings are not produced, certification is granted against them, they are held to be forged, and they are reduced and improved accordingly; but, farther than this, the law has not proceeded; that, as in this case, the writing said to be false and forged is not produced, no *corpus delicti* appears, and consequently it is not competent to proceed to trial of forgery; such trial would be as incongruous as it would be to proceed to a trial of murder, when it did not appear that any person had been murdered; nor is there any precedent of a trial of forgery, where the writing, said to have been forged, was not produced.'

Answered for the pursuer ; It is *the crime libelled*, and not *the thing* on which the crime is committed, which, in criminal prosecutions, constitutes the *corpus delicti* ; thus, in trials of murder, the commission of the murder must be libelled, but the production of the person murdered is not required ; so also in this case, as the forgery of a certain writing is libelled, the production of the writing itself is not necessary ; indeed, were it otherwise, the law would be daily eluded ; and offenders, especially forgers, screened from punishment ; for that, according to the position laid down for the defender, a forger might, at any time, by destroying the forged writing, prevent all possibility of prosecution. There are also two precedents in point for the pursuer ; one in the case of Captain Barclay, mentioned by Mackenzie, Criminal Law, title FALSEHOOD, § 5. and more fully related by Stair, in his decisions, Barclay against Barclay, *voce* WITNESS ; and Lady Towie against Captain Barclay, *IBIDEM* ; and the other in the case of Gilchrist and Breadie, determined about thirty years ago. See IMPROBATION.

‘ THE LORDS repelled the objection.’

Act. R. Dundas, R. Craigie, Binning, & *Advocatus*. Alt. A. Pringle & Lockhart. Clerk, Pringle.
D. Fol. Dic. v. 3. p. 176. Fac. Col. No 60. p. 92.

SECT. VIII.

Crimen Falsi.

1747. January 20. ANDREW LEITCH against ROBERT HALL.

THERE being a contention in the town of Rutherglen, about the election of their Magistrates at Michaelmas 1746, one of the parties obtained a sist on a bill of suspension of the rights to vote of certain coaliers, burgesses of the town, and intimated it at the time of the election ; but Robert Hall, notary-public, had added in the bill the names of three more coaliers not contained therein, when the sist was granted.

This occasioned a complaint, to which he pleaded youth, and ignorance of the offence ; and produced very ample certificates of his character from the Judges and practisers in the courts at Glasgow, where he acted as a procurator, and other persons of credit there.

No 20.

A notary having filled up names in a past bill of suspension, which were not in it when presented, was deprived of his office.

No 20.

THE LORDS, on the 15th, found the filling up the names of three persons more than were contained in the bill, to have been a practice illegal and unwarrantable, and highly dangerous to the public, and deprived him of his office of notary, and found him liable in the expenses of the complaint, and fined him in forty shillings Sterling to the use of the poor. And this day refused a petition and adhered.

Fol. Dic. v. 3. p. 177. D. Falconer, v. 1. No 155. p. 197.

* * Lord Kilkerran, p. 159, referring to this case, uses the following words :
'The adding the names of more suspenders to a bill of suspension, after it had passed the Ordinary's hand, found illegal, and punished.'

S E C T. IX.

Theftboot.

1757. July 2.

JOHN WARRAND and JOHN M'DONALD *against* WILLIAM M'PERSON.

No 21.

The transacting theft, but not concealing the crime, found not to be theft-boot.

JOHN M'DONALD having been robbed on the highway by Evan M'Pherson, for which Evan M'Pherson had been imprisoned, but liberated upon bail, William M'Pherson, a friend of Evan's, a few days after the bail, granted a bond for L. 26 to John M'Donald, which was the value of the goods lost, and of the expenses M'Donald had laid out in finding out the robber. In consideration of which, John M'Donald granted a disclamation of the following tenor : ' I John M'Donald, chapman in Stratherick, do hereby disclaim all action, instance, and execution that may be competent to me against Evan M'Pherson in Gargask of Badenoch, for and on whatever account, preceding this date ; and particularly any criminal action that I might have against him, the said Evan, for and on account of a robbery and atrocious riot and attack committed by him upon my person, and merchant-goods, on the King's high-road, in the hill of Corrieyarrick, on the 4th June last, with all that may be competent to follow thereon, for now and ever.'

M'Donald, neither before nor after this, ever made any secret of the robbery ; and Evan M'Pherson was afterwards tried, condemned, and executed for the crime, at the instance of the King's Advocate. M'Donald being cited, appeared as an evidence against him in the trial.

In an action at the instance of M'Donald, and Warrand, his assignee, against William M'Pherson, for payment of this bill of L. 26 Sterling, it was *objected* by William M'Pherson, That, in the above transaction, M'Donald had been

guilty of theft-boot, and thereby had forfeited any claim upon the bill in question.

No 21.

Answered for M'Donald; To make theft-boot, not only the transaction of a crime is required, but also the concealment of it, so as to be assisting in the defeat of justice, or putting the thief *fræ the law*, as the act James V. Parl. 1. cap. 2. expresses it. But here M'Donald only took payment of what he had himself lost; and he was so far from concealing the crime to defeat justice, that he told it to all the world.

'THE LORDS found, that action lay on the bill.'

Act. *Montgomery, Lockhart.*

Alt. *John Dalrymple, And. Pringle.*

J. D.

Fol. Dic. v. 3. p. 177. Fac. Col. No 33. p. 56.

SECT. X.

Riot.

1752. February 18. ELSPETH MARISHAL *against* MARGARET SEMPLE.

No 22.

Trial of a riot by a Sheriff without a jury, sustained.

A RIOT pursued before the Sheriff of Lanark by Elspeth Marishal *contra* Margaret Semple, was, by bill of advocation, brought before the Lords, *inter alia*, on this ground, that the Sheriff's interlocutor was too extensive in finding the libel relevant to infer an arbitrary punishment, the riot being with such aggravations laid in the libel, particularly of its having been committed by way of hamesucken, that the sentence might, on proof, extend to corporal punishment or banishment; in order to either of which, it was necessary for the Sheriff to have proceeded by a jury.

This reason of advocation the Ordinary 'repelled,' and the Lords 'refused the petition against his interlocutor without answers.'

It was upon this occasion said, that there is no point less fixed than this, when a trial was to be by a jury, and when not; but so far was certain, that inferior judges, particularly the Magistrates of Edinburgh, are in use to judge in riots without a jury, even where banishment from the town, and whipping, has been inflicted.

Fol. Dic. v. 3. p. 178. *Kilkerran*, (DELINQUENCY) No 15. p. 164.

1757. July 6.

HUNTER *against* AITKEN.

No 23.

A person punished for a riot, though in recovering a continued possession.

AITKEN had, for some years, possessed a seat in the church of Aberdour. Hunter, apprehending he had a preferable right to that seat, sent a peremptory message to Aitken, that he would next Sunday take possession of it; and accordingly took his place a little before Aitken came to church. Aitken arriving, desired him to come out; and, upon his refusal, gave him names, and seized him by the collar. At this time public worship was begun by singing psalms, and the congregation was disturbed. Hunter, after some struggle, left the seat, but brought an action against Aitken for the riot.

THE LORDS imposed a fine of L. 2 Sterling upon Aitken for the riot, payable to the poor of the parish; but, in respect Hunter had endeavoured by his own authority to invert a continued possession, they found no expenses due.'

Act. Wedderburn, Wa. Stewart.

Alt. And. Pringle.

Clerk, Home.

W. J.

Fol. Dic. v. 3. p. 178. Fac. Col. No 37. p. 61.

S E C T. XI

Injuries to Judges in Office.

1738. June 3. EDWARD *against* SIR JOHN DALRYMP' E and Others.

No 24.

Justices of Peace may *de plano* punish indignities against them in their official capacity, but not such as are merely personal.

AFTER a meeting of the justices of the peace was over, and when the gentlemen were about to take horse, the woman of the house where they met, used some of them very roughly by most injurious language, whereon the justices returned into the house, proceeded against her *de plano*, and sent her directly to goal.

In a suspension and reduction of this decree, containing a conclusion of damages, the decree was affirmed, and the defenders assolizied on this ground, That the expressions were not merely personal to the gentlemen, but to them as in the office of justices of the peace, which was thought very different from what the case might have been, had they been only personal; in which case it would not have been competent *jus sibi dicere*.

Fol. Dic. v. 3. p. 178. Kilkerran, (DELINQUENCY) No 1. p. 155.

S E C T. XII.

Malversation in Office.

1740. *July 12. & 25.* PRIMROSE Suspender.

No 25.

THE Justices of the Peace of Haddingtonshire, having fined an officer of Excise for having entered the house of an alehouse-keeper under cloud of night, without the presence of a constable, and searched for run brandy, in five pounds Sterling to the party, and ten shillings to the procurator-fiscal, though neither forcible entry was alleged, nor that the landlord opposed or declined the search, at making whereof he was present; and a bill of suspension of this decree being refused by the Ordinary, two reclaiming petitions were refused without answers.

Fol. Dic. v. 3. p. 178. Kilkerran, (DELINQUENCY) No 6. p. 157.

1749. *February.* HOPE against DRUMMOND.

No 26.

ENSIGN HOPE gave in a summary complaint against Robert Drummond, messenger, for having executed a caption against Sir Alexander Hope his father, when disordered in his senses, and in the infirmary, into which he had been put the night before by his friends on that account, and having thence carried him, not to prison, but to a public house, where he had searched his pockets and taken from him what money he had.

A messenger
fined for mal-
versation in
office.

Drummond having been appointed to attend, *answered*, That he owned he had, in virtue of a caption, apprehended Sir Alexander in the infirmary, which was no sanctuary: That he did not to him appear to be disordered in his senses: That he carried him to a public house at his own desire, that he might have time to apply to his friends to bail him; but not prevailing on any, he accepted of four pounds four shillings Sterling, which Sir Alexander voluntarily gave to his employer to account of the debt; and denied putting hand into Sir Alexander's pockets.

Upon proof brought by either party, it appeared that Sir Alexander was in great disorder in the infirmary: That the woman who keeps the house had remonstrated against taking him out in that condition: That the messenger would not desist: That Sir Alexander went into a chair, in which he was carried to a house between the head of Forrester's wynd and the tolbooth: That he there again behaved like a person not sound in his judgment, having wrote letters to Gavin Hamilton and others, which appeared to the landlord in the house, who

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read them, to be unintelligible: That he was kept in that house four or five hours: That, at last, he gave the messenger L. 4 : 4s. which the messenger gave to his employer, who was at the time in a different room in the house, and then the messenger left him about 11 o'clock at night; but no evidence was brought of the messenger's having put his hand into Sir Alexander's pocket.

Upon advising this proof, the LORDS found, 'That the execution of the caption was illegal and oppressive, and with a malevolent intention to extort money from the debtor; and declared the defender incapable of the office of messenger and notary, and appointed the same to be intimated to the Lyon-court, and committed him to prison for a month.'

It was very plausibly *argued* from the Bar, that even madness itself was no bar to the execution of the King's letters. Nor was the judgment put upon it, though the condition Sir Alexander was in, was, no doubt, the main circumstance which influenced the judgment; for, had there been no more in it, than the carrying the prisoner to, and detaining him some hours in a private house, that he might have time to solicit his friends to bail him, and letting him go upon his paying a part of the debt, it would have merited a slight censure, if any: But, in the circumstances Sir Alexander was in, the Lords considered the defender's conduct in not carrying him directly to prison, but detaining him so long in a public house, till a little money was got, as having proceeded, not from his opinion of the duty of his office, but from an intention to extort the money, which his office did not warrant him to do: At the same time, the punishment was by some thought rather too severe.

Fol. Dic. v. 3. p. 178. Kilkerran, (DELINQUENCY) No 13. p. 161.

See REPARATION.

See PROOF.—Delicts how proved.

See APPENDIX.

APPENDIX.

PART I.

DELINQUENCY.

1776. June 22.

WALTER JARDINE *against* WILLIAM CREECH, CHARLES ELLIOT, and
WILLIAM SMELLIE.

IN the Edinburgh Magazine and Review for March 1774, there appeared the following paragraph: “ An essay from Bathgate, signed J—D—NE, “ against a ball lately held at Whitburn, is received, but is totally void of merit. “ We are sorry that any correspondent should transmit to us a paper for the “ public, which exhibits alternate strokes of superstition and blasphemy. The “ author, at the same time, possesses not any talent for composition. He “ writes with an utter contempt of all the rules of grammar. It gives us real “ pain, from the letter which accompanied this reprehensible and unworthy “ essay, to learn, that it is the production of a schoolmaster, and that it is ap- “ proved of by a popular Clergyman. At any rate, it would be highly im- “ proper for us to publish a paper of which the obvious tendency is to foment “ dissention among neighbours, and to wound the characters of the respectable “ persons of both sexes who were present at the ball, which has given so “ much offence to this correspondent.”

Walter Jardine, schoolmaster at Bathgate, and preacher of the gospel, thinking himself pointed at in this paragraph, commenced a prosecution for damages and expenses against William Smellie, as Printer, and the other defenders as Publishers of the Edinburgh Magazine and Review. This action came before Lord Kennet Ordinary, who after hearing parties and advising memorials, ordered informations to be given in to the whole Court. The following arguments were used for the defenders:

No. 1.

The publishers of a Magazine and Review found liable in damages to a person, who, although denoted only by initials, appeared to have been meant in an injurious paragraph.

See No. 9.
p. 3488.

No. 1. They denied that they had any intention whatever of injuring the pursuer ; that the paragraph in itself does not contain any thing actionable ; and that in case any part of it had been liable to be misconstrued by any person, they had declared their willingness to obviate every misconception of that kind, by inserting a paper in their next Magazine, conceived in such terms as the pursuer himself should dictate. In short, they had not only been innocent themselves of every injurious intention, but had been anxious to prevent others from injurious interpretation.

That there was no *animus injuriandi* is evident, as the pursuer was by no means so described or pointed out in the paragraph as that the application could with any propriety be made to him. The essay indeed is said to have been from Bathgate. But this is merely telling the place from which it bore to be dated, and is no certain indication of the place from whence it comes. Most of the papers, on the contrary, transmitted for publication, *purposely* bear date at other places than those from which they really come, in order that the author may be the better concealed. Supposing it however to come from Bathgate, it does not thence follow that it was sent by Mr. Jardine ; for Bathgate is a considerable village, and many persons in it may be supposed equally capable of transmitting an essay to the Edinburgh Magazine and Review.

Again, as to the signature subjoined, no rule of construction whatever can make it applicable to the name *Walter Jardine* : The mode of subscription in this country, is not left to whim or caprice, but is precisely regulated by law. Thus the act 1672, C. 21, declares, " That it is only allowed for Noble-
" men and Bishops to subscribe by their titles, and that all others shall sub-
" scribe their christened names, or the initial letter thereof, with their sir-
" names, and may, if they please, adject the designations of their lands, pre-
" fixing the word *of* to their said designations." This being the case, the subscription to this essay, if a real subscription, must be either one word or two : If one, the subscription of a *Peer* ; if two, the subscription of a *Commoner* : If the former, not claimable by the pursuer,—if the latter, not applicable to him : Because, as either the whole of his christened name, or at least the initial letter of it, is by law an essential part of the subscription, the letter *W*. must in this case have been the first letter, or a blank space at least with a line must have preceded the letter *J*. But this not being the case, the pursuer cannot be permitted to apply to himself a subscription which bears no letters, but those of his surname, and has not the least vestige of his christian name at all. This signature, accordingly, will apply much better to many other names than to that of *Walter Jardine*. To one *John Downe or Dunne*, for example, who lives in Bathgate, and who in the earlier part of his life, had been a schoolmaster. Or rather the signature may be regarded as assumed, and as alluding to the celebrated Doctor John Donne, who flourished in the reign of James the First of England, and who, like the author of the essay, was a severe satirist against the vanity and folly of the age. There is nothing therefore in this

signature to make any person believe that the pursuer was pointed out by it; or that the defender meant to injure him when at the time the publication was made, they had never seen nor heard of him. And what then is it to him that the essay on the Ball at Whitburn is to be totally void of merit? For however little merit the essay may have, he is not answerable for it. In this view of the case, whatever exceptionable passages there may be in the paragraph complained of, they cannot be considered as either injuring, or intended to injure the pursuer. But at any rate the passages themselves are not actionable.

Thus the essay is said to exhibit "alternate strokes of superstition and blasphemy." But these words are of a meaning too indefinite to be actionable. The meaning of *superstition* is very undetermined, and to call a man superstitious in a country where toleration and liberty of conscience prevail, can never be actionable, otherwise every religious sect would in direct contradiction to the very idea of toleration be perpetually harrassing another with actions at law. Protestants of all denominations hold the Papist to be superstitious; and among Protestants themselves, one sect throws this reproach upon another. Yet it never was heard of, that an action could be sustained against a person for having declared that the invocation of saints is superstitious, or the use of the cross in baptism. To indulge such actions between private persons would be indeed the most grievous persecution.

Another passage at which particular offence was taken, is as little actionable. In this passage it is said that the author of the essay "possesses not any talent for composition; and that he writes with an utter contempt of all the rules of grammar." The pursuer, thinking himself pointed out as the author, exclaims loudly against the injury done to him as a schoolmaster, in supposing him ignorant of composition, and unacquainted with grammar. But with regard to the first, a talent for *composition* is no essential qualification of a schoolmaster, whose business it is to teach, not rhetoric, but grammar; and a piece may be completed in point of syntax in the highest part of grammar, while it may be most barbarous and detestable in point of composition. As to the author's knowledge in grammar itself, the passage complained of says nothing. It mentions indeed, that the author of the essay wrote with an utter *contempt* of all the rules of grammar; but by no means that he did not understand or was not able to practice those rules, but only that he paid no regard to them, as being things beneath his notice.

As to its being mentioned in the paragraph complained of, that the essay was the production of a *schoolmaster*, and approved of by a *popular Clergyman*; nothing can be drawn from this to prove that the schoolmaster of Bathgate was the author, and that the minister of Bathgate was the person who revised it. And as to the last sentence in the paragraph, in which the Reviewers state, that it would be highly improper for them to publish a paper "of which the obvious tendency is to foment dissensions among neighbours," &c, there was here

No. 1. no *animus injuriandi* more than in the other passages, and every hazard of a misconstruction, was offered to be instantly removed by them, by inserting, as has been mentioned, in the next publication, whatever paper the pursuer should choose to dictate.

The cause in short resolved itself into two simple points of view. Can what is said in the paragraph founded on be relevant to found an action of damages? And is that action competent to the pursuer? With regard to the first, it is surely not relevant to infer an action of damages to say that a performance is void of merit, that the author possesses not any talent for composition, and that he writes with an utter contempt of the rules of grammar. Were such criticisms actionable, amidst the animosity of contending authors, and the jealousy of rival wits, many an action of this kind would have been instituted before now. But the world has never hitherto heard of one. And in respect to the second, though the paragraph were actionable, yet every thing contained in it is spoken of an essay of which the pursuer positively denies himself to be the author. When the author of that essay appears, and proves the essay to be written by him, he will be entitled to found on any thing actionable in the paragraph, but till then no other person can be entitled to pursue upon account of calumny against the essay.

For the pursuer, it was argued, that notwithstanding the precaution of leaving blanks in the name, the paragraph was naturally an obvious one, and obviously applicable to him and to him only. It were impossible to read the paper without being convinced that the matter it contained is libellous. The superstitious man must be very ill fitted for instructing children in the principles of religion; the man who writes with an utter contempt of all the rules of grammar, must be a very bad teacher of languages; and he who by his writings foment dissensions among neighbours, can with no propriety be said to superintend the morals of those who are committed to his care. And to accuse a preacher of the gospel of exhibiting strokes of blasphemy is a charge of so heinous a nature, as to be dictated only by the utmost malevolence and cruelty; there could therefore be no doubt of the *animus injuriandi* upon the part of the defenders.

In the *second* place, this libellous paragraph applies most clearly to the pursuer. The essay is said to be from Bathgate, to be signed J—D—NE, and to be the production of a schoolmaster. These words can upon no fair construction be tortured into any other meaning than that of Jardine, schoolmaster at Bathgate. And this description is not only applicable, but has in fact been applied to the pursuer by all who know him, and many even who do not know him personally, and to whom, though living at a distance, the fame of the Reviewer's paragraph has reached, believe the pursuer to be the author of some impious and detestable essay. As to the criticism upon the signature, and calling up the shade of Dr. Donne, this might be very fanciful, but contains nothing solid. People who assume the signature of Sidney, Hamden, &c. do not leave blanks in those names; and the letters of the signature cannot apply

to a Peer, for there is no such name of a Peer in the kingdom. It must therefore be the name of a Commoner, and it will be difficult for the defenders to point out any name which can be designed by it except Jardine.

The pursuer likewise insisted upon production of the essay, which was censured in the Reviewer's paragraph. To this the defenders replied, that they destroyed the essay, as was their custom with regard to all communications not proper to be inserted.

It was observed on the Bench, that it was difficult to get into this cause, which was to be considered in two lights;—1st, Whether such an essay was ever sent,—for if it was not sent, the paragraph was clearly scandal; and, 2^d, If it was sent, then the Reviewers mention only a fact, but do not charge this pursuer.

The Court, however, by a scrimp majority, found damages and expenses due to Mr. Jardine, and of this date (22d June 1776), modified the same to fifty guineas.

Lord Reporter, *Kennet*.

Act. *Alex. Belcher*.

Alt. *G. Wallace, Crosby, Tytler*.

J. W.

1776. July 12.

DR. JOHN MEMIS, Physician in Aberdeen, *against* PROVOST JAMES JOP, and Others, MANAGERS of the INFIRMARY of ABERDEEN.

DR. MEMIS instituted an action against these defenders, in order to obtain redress for the alleged injury of having caused his designation "*Medicinæ Doctor in Aberdonia*," in the charter of the Infirmary, be translated "Doctor of Medicine in Aberdeen,"—instead of "Physician in Aberdeen."—He stated, that the term Doctor of Medicine, was applicable only to Students immediately after graduation, and before entering on practice, and never to Physicians in practice. He mentioned that a direct injury had been intended against him, obvious by this circumstance, that the term *Medicinæ Doctores* occurred in a subsequent passage of the charter, which, being applied to other persons of the same professions, was translated "Physicians;"—and that, finally, he had actually suffered injury in his character and business by the marked affront put upon him.

The Lord Gardenstone Ordinary having appointed the case to be stated in memorials, pronounced, on advising them, the following interlocutor: "Finds "no evidence that the defenders, when they caused print the charter incorporating the President and Managers of the Infirmary of Aberdeen, intended "to derogate from the honour or dignity of the pursuer by translating *Joannem Memis Medicinæ Doctorem in Aberdonia*, John Memis, Doctor of Medicine in "Aberdeen, and, indeed could intend none, as the Latin was printed on the

No. 1.

No. 2.

Action sustained, for giving a designation to a professional man, alleged to be degrading.

- No. 2. "opposite page,—so every man could judge:—And further finds, that the
 "title Doctor of Medicine is a legal title, founded on the person's having been
 "tried and found to be qualified, by those who are intrusted by the state, in
 "order to distinguish them from quacks and pretenders to skill in medicine;
 "and in strict propriety superior to and more to be depended on by strangers
 "than that of Physician, which every dealer in physic may assume; and there-
 "fore finds the process groundless, assolizies the defenders, and decerns;
 "and finds the pursuer liable in expenses; and recommends to him, if he is to
 "reclaim, to apply to the Court by petition."

The pursuer accordingly did present a petition to the Court, in which he endeavoured to make out, that a deliberate design to affront and injure him had been entertained by the defenders, which had discovered itself prior to the particular injury now complained of; that having published a book upon Midwifery, he had on the title page adjoined to his name the following description, "D. M. of the Marischal College, Aberdeen." By this he had meant only that he had been a Student of the Marischal College, not that he had received his degree there, which he had obtained at St. Andrew's. The Physicians of Aberdeen had, however, published in the English newspapers an advertisement, declaring that he had never received any degree from the Marischal College. This had given a handle to the Reviewers in animadverting upon his book, which they had consequently ridiculed.—Thus had the defenders first affected his reputation in London, by disclaiming him as unworthy to be ranked in their society; and now they hoped to deprive him of his bread in Aberdeen. The injury did not consist abstractedly in denominating him Doctor of Medicine, instead of Physician, but in making a *distinction*, by describing him in that way, while others of the same profession were in the same deed named Physicians. He was, however, ready to substantiate by proof, that Physician was an established technical legal term, peculiar to a *practising* Physician, which the term Doctor of Medicine was not, which any mountebank might assume with impunity, while the Physicians would have ground of action against him, if he should presume to use their peculiar title. The pursuer further averred, that before bringing the action, while the charter was in the press, he had warned the defenders of the injury about to be done to him, and had obtained and intimated to them the opinion of Principal Campbell, that the term *Medicinæ Doctor* ought to have been translated in a similar manner throughout the charter;—yet, they had resolutely persisted in their attempt to injure him. He illustrated his case by supposing, that in a Scotch deed, in which several Advocates were named, one of them were to be called "*A. B. procurator*;" or where several Writers to the Signet were mentioned, one of them were to be described "*A. B. scribe*;" or in an English deed, of several attornies, one was to be designated *scrivener*,—a term which is now become opprobrious, and equivalent to *usurer*. He concluded, that in such cases, where two designations may be applied to a man, the one of which honours, and the other

degrades, he will be entitled to complain, if in a publication to the world, the last and not the first is intentionally and maliciously given to him.

It was further urged by the pursuer, that not only his professional honour, but his fortune had been affected.—The emoluments of a physician arise from a belief in the public that he is a physician: Strip him of that title, in the eyes of the public, and his emolument ceases. This the pursuer had sensibly felt from the time when his brethren denied him a title which they retained to themselves.—The words of Blackstone, B. 3. C. 8. p. 5. were quoted, as applicable to the case, where after treating of heinous verbal injuries, he adds, “But with regard to words that do not thus, apparently, and upon the face of them, import such defamations as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying his action with a *per quod*.”

In the answer, the defenders mentioned that they were at a loss how to treat so very singular and ludicrous a case.

To laugh, were want of decency and grace,
And to be grave, exceeds all power of face.

They utterly disclaimed all intention to give offence to the pursuer by the transaction in question. They produced a letter from Principal Campbell, declaring that he had not, as had been alleged by the pursuer, struck out the words “Doctor of Medicine” in the translation, where they are applied to the pursuer, and interlined the word “Physician;” and the Principal adds, “It never entered into my head that any person of common sense could have taken the least exception at that manner of translating the words *Medicine* “*Doctor*.”—They mentioned that the pursuer was under a mistake in supposing he had been singled out in the translation by the title of “Doctor of Medicine.” There was no particular person mentioned in the subsequent part of the charter alluded to. Upon the latter page, on one side, were these words, “*Duo Medicinæ Doctores in Aberdonia residentes*,” which on the opposite page were translated thus: “Two of the Physicians residing in Aberdeen,”—applicable to a collective body, and to no particular person. The variation of the phrase was for the sake of better language, as one talks of Physicians in the plural number, although one of the Faculty may be entitled a Doctor of Medicine.

The defenders further pleaded, that the argument from the contrasted appellations of Advocate and Procurator,—Writer to the Signet and Scribe,—Attorney and Scrivener,—laboured under this capital defect, that the designations of Procurator, Scribe, and Scrivener, are indeed inferior ones; whereas Doctor of Medicine is an appellation equally creditable with that of Physician, and equally applied as a *vox signata* to gentlemen who profess the healing art. Had the pursuer been designed Surgeon or Apothecary, he might

No. 2. have had reason to complain: Accordingly "Justice Twisden said, he remembered a shoemaker brought an action for saying he was a cobbler, and it was held "this action lay in Chief Justice Glynn's time." *Modern Reports*, fol. 19.—The Roman law was extremely careful to guard against every species of affront, real or verbal; and in the title *De Injuriis* there are a great variety of cases put, in so much that one wonders at the very minute attention given by great lawyers to the niceties of manners in civilized life;—yet amidst all that variety, nothing can be found similar to what has struck the pursuer's fancy as an offence.—The defenders acknowledged, that there is undoubted propriety in checking injuries even of the slightest kind; and it is unquestionable that actions have been sustained in England, upon expressions at first sight not very strong. Thus, "One said in the north county of a barrister, that he was a *daffindowdilly*, which was adjudged actionable, as an *innuendo*, in respect of his profession, because by this word is meant "there an *ambidexter*, being a flower of party colour." *Cro. Eliz.* 914. And in the law of Scotland, it is laid down, *Erskine*, B. 4. T. 4. § 80, "as one "may be sensibly hurt by reproachful words, though they should have no "tendency to blacken his moral character, sarcastical nicknames and epithets, "or such other strokes of satire, are accounted injurious." But these principles are not at all applicable to the present case, where there was obviously no *animus injuriandi*, since the term DOCTOR OF MEDICINE was not in fact a degrading appellation, but an honourable one, and equally respectable with that of Physician.

Every privilege and every pecuniary advantage attendant on the title of Physician, equally belong to a gentleman who is designed Doctor of Medicine, and these are sometimes very important. The following is a noted instance: "If one that is no *Physician allowed*, take upon him to give physic, and kill his "patient, this is felony; but if he be a *Physician allowed*, and do so out of "ignorance or negligence, *contra*." *Stamp. L. 1.* p. 16. *Fitz. Coron.* 163.—Here a prodigious point was gained, of which the pursuer might rest assured his St. Andrews degree would secure him all the consequent immunities.

Scotland, it was said, had been thus ridiculed by a rhymster:

"Blest land, where Ladies, Lords, and Lairds abound,
"And *Doctorships* are sold out by the pound."

But this satire did not apply to the University of Aberdeen. The pursuer did not obtain his degree there, but, on the contrary, was refused one when he applied for it. The defenders no doubt did, when the title-page of the pursuer's book above-mentioned, appeared, publish an advertisement in the *London Chronicle*, signifying that John Memis had no degree from the *Marischal College* of Aberdeen. If the pursuer was injured by the publication of this *fact*,

he brought the injury upon himself, by announcing himself in a manner obviously tending to mislead the public.

No. 2.

The matter was further commented upon in a very ingenious manner on both sides, in replies and duplies; and the Lords, "*before answer*, ordained "the pursuer to give in a special and particular condescendence of the facts "and circumstances he offered to prove in support of his libel."

This was done, and the Lords, at advising, *still before answer*, "Allowed "Dr. John Memis, pursuer, to prove all the facts and circumstances contained "in his condescendence and replies; and allowed James Jop and the other de- "fenders to prove all the facts and circumstances contained in their answers "and duplies; and allowed both parties to prove *all other facts and circumstances* "which might throw light upon the cause; and allowed each party a conjunct "probation with the other; and granted commission to the Sheriff Depute of "Aberdeenshire," &c.

A voluminous proof followed, the import of which was stated in long and elaborate memorials, in which an uncommon degree of ingenuity was displayed on both sides. But it would be an object rather of curiosity than of use to enter into a detail of the argument.—The pursuer ultimately failed of making out his case, and the defenders were assoilzied.

Act. Dav. Rae. H. Erskine, John Dalrymple. Alt. A. Murray, Jas. Baswell.

*. * This report, while it elucidates the principle of the law, that a complaint will be listened to, when there is barely the *possibility* that an injury has been committed,—and the matter will be patiently investigated; at the same time exhibits a striking instance of the impropriety of allowing *proofs at large* before answer. Here a tedious litigation subsisted for several years, at an enormous expense, which might have been greatly diminished, by circumscribing the proof to such articles only as were relevant.

W. M. M.

1776. August 8.

JOHN, ROBERT, and DAVID SCOTLANDS, *against* The REV. MR. JAMES THOMSON, Minister of Dunfermline.

No. 3.

AT the Michaelmass election of the Town Council of Dunfermline in 1774, reports having been spread that the Messrs. Scotlands, and particularly Robert, had acted from improper and corrupt motives in opposition to the interest of Col. Arch. Campbell, candidate for the Dunfermline district of burghs, and whose party they had espoused, Mr. Thomson, one of the Ministers of that burgh, took occasion in a sermon from Romans, chap. 8. verse 32. after con-

Limits of liberty of the pulpit, with regard to censure.

No. 3. gratulating Col. Campbell and his friends on their success, to use the following expressions, "That they had reason to be thankful they had escaped the snares laid for them by that person, who had betrayed the trust reposed in him, and who was eating his bread and wearing his apparel, yet had lifted up his heel against him. That this person had much better stuck to his first party, as he had brought disgrace upon himself and family that would rebound against him and his generations to come." And concluded his discourse with the following passage of scripture: "He that getteth riches not by justice is as a partridge that sitteth upon eggs and hatcheth them not, and his latter end shall be as a fool."

Robert Scotland, considering himself from the manner of the speaker as the person aimed at, and a paragraph also having appeared in the paper called the Caledonian Mercury, stating that a Dunfermline agent had been bribed to betray his trust, wrote a letter to the publisher of that paper, which was inserted in the Mercury, in which he positively denied his having ever betrayed his trust or acted in such a manner as to merit the aspersions thrown out against him, —adding "and that every publication, report, or insinuation to the contrary, by whomsoever related, whether from the pulpit by a blustering blunderbuss of an old military chaplain, a peep sma', or all other such like busy bodies, is false and slanderous, and most ungratefully injurious to the good name and reputation of me and my friends."

Recently after the publication of this letter in the newspaper, Mr. Thomson delivered a sermon, upon the following text: Ephesians, chap. 4. verse 25. —"Wherefore putting away lying, speak every man truth with his neighbour, for we are all the members one of another." And after describing to his hearers the different kinds of lying, he proceeded nearly in these words: "Having thus explained to you, my Brethren, the different kinds of lying by which we may hurt our neighbours or sin against our own souls, will any man pretend to tell me, after being informed by three incontestible evidences, that *you, Sir*, (pointing it is said his hand towards John Scotland) I am not ashamed to say it, do not lie when you pretend to maintain that you did not promise and engage to support Col. Campbell's interest," &c. Then looking towards David Scotland, addressed him in a similar style; and last of all, went on thus: "And *you, Robert Scotland*, who have wrote a paper which appeared in the Caledonian Mercury, giving me the epithet of an old military chaplain, this is a name I glory in, having lived fourteen years in the army, where I was always happy, and well satisfied with my situation; you also term me a blustering blunderbuss, which I refuse, and will aver to the whole congregation, if that cap does not more properly suit your head than mine. I have however stronger things to say than this. Will any man pretend to maintain but that *you lie* by saying you are a faithful and diligent agent for Col. Campbell, when the contrary can be proven by the evidence of three indisputable witnesses? If you had been a faithful agent

“for Col. Campbell, why were you so often in the camp of the enemy? A man in the army, if he were found in the enemy’s camp, would be shot next day. Had you acted justly and honestly,” &c. Concluding thus, “I therefore think it is plain, that no person is safe to do any business with you, nor your friends. Perhaps you will say, what business has all this to do with the pulpit? But I think it has as much to do with the pulpit, as your paper had with the Caledonian Mercury, and those that sin before all, ought to be rebuked before all, that others may hear and fear, and do no more so wickedly. Wherefore refrain from lying,” &c.

The Messrs. Scotlands upon this brought an action of damages against Mr. Thomson before the Court of Session, which having come to be heard before Lord Gardenstone Ordinary, he of this date (28th February 1775) pronounced the following interlocutor: “Having heard parties, and considered the memoirs, and having particularly considered the provoking publication in the Caledonian Mercury, antecedent to the sermon complained of, and the immediate retaliation by the complainers in open congregation, when the expressions which gave offence were delivered, Finds this process against Mr. Thomson improper and groundless, therefore assoliszes the defender; finds expenses due, and allows an account thereof to be given in.” And to this judgment his Lordship adhered, by an after interlocutor.

The pursuers contended, in a reclaiming petition,—1st, that the pulpit has been well termed the chair of verity, and that nothing could be more derogatory to the honour of the church and its members, or more destructive to the peace of society, than to suffer it to become a vehicle for propagation of private scandal and defamation, or to be made an engine for gratifying private revenge and resentment: That the publication of a libel in any other manner cannot be attended with half the prejudice to an injured party,—from the influence which every Minister has or ought to have over the minds of his hearers,—the faith due to any thing asserted by him in such a place,—the number of people present,—and the consideration that sermons are generally reduced into writing before they are delivered, and nothing supposed to be spoken from the pulpit, but what has been previously weighed, and deliberately considered by the preacher: That there can therefore be no doubt that a civil action for damages lies at the suit of the party against the preacher of a defamatory sermon; for such sermon is a libel in the proper sense of the word, and is published in a manner much more destructive and pernicious than any other mode that can well be devised;—and ecclesiastical courts, though they can inflict a censure on the delinquent, cannot award damages or reparation to the party injured.

There may no doubt be a liberty of the pulpit in the matter of censure necessary to the improvement of the morals of the people. But the purpose of sermons being to convey instruction in the great duties of morality and religion, Clergymen have no right to expose the characters and conduct of particular

No. 3. persons, or to pronounce *de plano* a censure upon them. The right of instructing the people by discourse, and of inflicting the censures of the Church, are obviously distinct from each other. The former is committed to every Minister: The other is reserved to the proper judicatories, established by the usage and constitution of the Church. If Mr. Thomson believed the pursuers to be guilty, a process before the kirk session was in his power, instead of the unwarrantable and injurious attack which he chose to make from the pulpit.

2d, With regard to the provocation given by the letter published in the Caledonian Mercury, it is not sufficient to justify the sermon afterward delivered by the defender; and it can at most apply only to Robert Scotland, one of the pursuers. Besides the epithet in the letter of a *blundering blunderbuss*, does not describe the defender by name; and it is likewise to be considered, that this letter was written after the first sermon by Mr. Thomson, which affords a complete excuse for any asperity of expression.

3d, As to the defence of retortion, as every verbal injury has the natural effect of provoking the person who receives it, and must consequently be very apt to occasion rash and hasty expressions on his part, it would therefore be very dangerous to give too ready an ear to the defence of retortion founded upon them. Were every hasty reply to found this plea, it would in a great measure secure impunity to the most gross and deliberate injuries, wherever they were offered to men in the least degree hasty in their tempers. A plea of this kind may sometimes be just, where the injurious expressions have been unpremeditated on both sides, or where other circumstances concur in establishing an equality between the parties; but it never can be just, where the expressions on the one side, from the more deliberate manner in which they have been used, from the station of the speaker, or any other such circumstances, have the most hurtful consequences to the person attacked. Unpremeditated expressions used in the heat of passion without any intention to defame, are not properly actionable as verbal injuries; and it would therefore be extremely hard, should a man who has been injured in the highest degree, be precluded from the redress he would have otherwise been entitled to, merely in consequence of an intemperate expression, the natural effect of the wrong sustained. The law even cannot allow an offender to avail himself of the passion into which he has industriously thrown the injured party, for the purpose of avoiding a claim of damages to which he would otherwise be subjected.

4th, Though the pursuers have no desire to avoid a full inquiry into the grounds of the charge against them, yet a proof of that kind, cannot in point of law be allowed to the defender. In actions for private scandal, or for words rashly spoken, the *veritas convicii* must perhaps be admitted to proof, as a circumstance to justify or alleviate the offence; and the like may hold where information is given of an alleged crime with a view to public prosecution. But in the case of a *libellus famosus*, an injurious libel deliberately composed and

industriously published, this defence of the *veritas convicii* has never been admitted, at least as a ground of total absolver. A libellous publication is an injury even to a guilty party, as proceeding from one who has no right to punish him: It is a breach of the peace, and an usurpation of their privilege, to whom the law has entrusted the prosecution, trial, and punishment of crimes. The right of prosecuting criminals thus is not allowed *cuiuslibet de populo*: It is confined to the public prosecutor, and the private party who has a proper interest. But the opposite doctrine would enable every man even having no interest in the matter, to bring any crime whatever to trial. He has only to publish a libel, charging the party with adultery, with rape, with murder, or any other crime, and when damages are sued for, he may plead the *veritas convicii*, and thereby compel the pursuer to submit to an expensive proof, and thus to be indirectly brought to trial for the alleged offence. *Veritas convicii* is no more admissible in a civil action for reparation, than in a criminal one for punishment of an injury. The only distinction made by the Roman law is betwixt a simple verbal injury, and the publication of a libel, the *veritas convicii* being allowed to exculpate or alleviate from the first. Voet, Lib. 47. Tit. 10. § 9. And the same is the genius of our own law, and seems to be that also of the law of England.

For the defender, answered:—1st, Rebuke and reprehension not only in private but in a public manner, when it could not otherwise be attended with effect, has always been held to be a part of the pastoral duty of this country. The practice is founded upon Scripture itself, and the constitutions of the church of Scotland inculcate it, (2d Book of Discipline, chap. 4.) Many examples accordingly occur, both of an ancient and of a later date, of great freedom and boldness of censure, employed by ministers in the pulpit.

This practice as all others, even the very best institutions, is capable of abuse, and when grossly abused is an object of punishment. But the question at the same time is of very nice discussion, incapable of being determined by any general rule, and of which the decision should be always consistent with the idea of the minister continuing to exercise his pastoral duty in its fullest extent.

2^d, Supposing the defender had been guilty of an excess in any expressions in his sermon, the provocation that was given him by the letter published in the Mercury, affords a sufficient excuse and apology. The defender is pointed out as particularly in that letter, as if he had been mentioned by name and surname, and while thus particularly pointed out, he is accused of making false insinuations to the prejudice of Robert Scotland's character, and to the prejudice of the character of others from the pulpit. Provocation so great seems of itself sufficient to afford a defence against this action; a doctrine which is distinctly laid down by Voet, Lib. 47. Tit. 10. § 20. where he enumerates those who are not liable in damages for verbal injuries.

No. 8.

3d, The immediate retortion of the injury is available to the defender, in order to bar action at the instance of each of the persons who retorted. Injuries, whether verbal or real, produce two different kinds of actions,—the one private, the other public; of which the first is an action for damages, for the purpose of reparation, not of punishment; and the second lies only in those cases, where the injury has a direct tendency to the breach of the peace, and to disturb the quiet of society. The effect and nature of these two actions are totally different: The latter must be insisted in by a public prosecutor, and is meant for punishment in terror: The former is at the disposal of the person injured, who may discharge it altogether, either expressly or tacitly. Various exceptions, accordingly, are competent against it, which a public action does not admit of. Since the nature of the action allows a discharge, either with or without a consideration, exceptions are admitted proceeding upon what ought to have operated as a discharge, though no discharge has been granted. As the tendency of it is a pecuniary consideration for damages, all exceptions that would lie to an action for debt, and of consequence a plea of compensation, are admissible here. For where there is a mutual claim of damages, these damages must compensate each other, and the private prosecutor must be barred by his own act, who has resorted to private retaliation instead of trusting to the effect of an action at law.

4th, Although *veritas convicii non excusat* in a criminal action, which is brought at the instance of those who have the charge of the public peace, yet it affords a good defence in a civil action for damages; for no man can with reason insist to have a sum of money put into his pocket, because he has been called a thief or a liar, when he is really as worthless as he has been represented.

The Court, Dec. 20, 1775, pronounced the following interlocutor: “In respect of the improper conduct of the defender Mr. James Thomson, unsuitable to the character of a Minister of the Gospel, contrary to the decency, dignity, and purity of the pulpit, and highly injurious to the pursuers, Find the said Mr. James Thomson liable to the pursuers in damages and expenses, of which ordain a condescendence and account to be given in, and in this case refuse to allow a proof of the alleged *veritas convicii*.”

The defender now reclaimed in his turn,—and with regard to the *veritas convicii*, pleaded, that their Lordships had in many instances, and particularly in the case of Gordon, No. 249. p. 6079. allowed a proof of it; and that the practice of the English Courts is fixed on this point, where in a civil action for damages the defender is always allowed to prove the truth of his allegation.—In answer to which cases, the pursuers replied, that they are founded entirely upon words uttered from recent provocation, or for some other circumstances clearly removing any suspicion of an *animus injuriandi*, and that in these cases a proof of the fact was allowed merely for the purpose of discovering whether there was an intention to falsify or defame, not whe-

ther the truth of the defamation would excuse it. With regard to the law of England, authors differed on that point, and therefore no recourse could be had to such authority.

No. 3.

The Court, 8th August 1776, pronounced the following interlocutor:
 “ The Lords having advised this petition with the answers, they adhere to
 “ their former interlocutor reclaimed against, and refuse the petition; and
 “ having advised the condescendence of damages and the account of expenses,
 “ modify the expenses to £52. 10s. Sterling in full, for which sum, and the
 “ expenses of extracting the decreet conform to the collector’s certificate,
 “ they decern; and as to damages, in respect of the behaviour of Robert Scot-
 “ land, find him entitled only to £5. Sterling of damages; but as to John
 “ and David Scotlands, find them entitled jointly to the sum of £25. Sterling
 “ of damages, and decern.”

Lord Ordinary, *Gardenstone.*
 Alt. *Hay Campbell et Grosbie.*

Act. *Rae, Dean of Faculty Dundas.*

J. W.

•• This judgment was affirmed on appeal.

1808. May 18.

REV. DR. ALEXANDER HUTCHISON, *against* JOHN NAISMITH.

THE pursuer and defender resided in contiguous properties; and, from various causes, there existed a considerable degree of mutual irritation.

The defender had let to the pursuer a stable and an open shed connected with it. In winter 1803, the pursuer sublet these premises to Mrs. Mitchelson. The lady obtained permission from the defender to put doors on the shed, provided they became the property of the defender at the end of the term. These doors having been put on; and at the end of the term, Mrs. Mitchelson having removed, the pursuer, under a misapprehension that they belonged to her, took down the doors, and laid them aside, till he should receive instructions from her with regard to them. At Whitsunday 1804, the term of the pursuer’s removal, the key of the stable was sent to the defender by a servant, who being required to deliver the key of the shed also, said, that the doors, with their locks and keys, having been put up, were likewise taken away by Mrs. Mitchelson.

Whereupon the defender addressed (19th May 1804) the following letter to the pursuer:

No. 4.

Publication
not necessary
to warrant an
action of da-
mages for in-
jurious and
defamatory
expressions
in a letter.

No. 4.

"Reverend Sir,

"You sent a message by your church-officer, Thomas Leiper, to Mrs. Naismith, on the 16th, importing that there were no lockers in the shed; that Mrs. Mitchelson, who put on the doors, had taken them away. I find this is as false as many of your other assertions. Mrs. Mitchelson has assured me that she was not in the knowledge of the doors being removed; and was much surprised to see that they were gone when she rode past the place on the 17th; and she has now given me authority to recover these doors and padlock, and use them as Mrs. Naismith's property.

"As there is good ground to believe that you have feloniously carried them off, if you will restore them in their former situation, you will save me the disgusting task of exposing you to the ignominy which your conduct has deserved. I am," &c.

(Signed) "JOHN NAISMITH."

P. S. I must remind you to keep up your poultry."

The pursuer answered, (25th May 1804.)

"Sir,—Yours of the 19th came to my hand only yesterday. Leiper must either have mistaken my message to Mrs. Naismith, or he must have been misunderstood. The message was, that I had taken off the doors of the shed, as they belonged to Mrs. Mitchelson, and laid them by to be at her disposal. Of this I gave her information by letter on the 15th current; and whenever I receive her orders, they shall be disposed of accordingly. As to the falsehoods and felonies you allege upon me, they are wholly unfounded, and below my notice, till you think fit to publish them. Your tongue or your pen will not blot my character. Wishing you a better temper, I am," &c.

(Signed) "ALEX. HUTCHISON."

And the defender replied, (May 29th 1804.)

"Reverend Sir,

"I thank you for the pious wish you expressed for the amendment of my temper, as well as for the pains you have taken to try it. By your own confession, the felony is established, which you say I have without foundation alleged, having owned that you carried off the property of another, without the knowledge and consent of the owner. I am equally well founded in charging you with falsehoods, of which I have ample proof. With respect to the last, there can be no misunderstanding. Having ground to doubt the truth of the message you sent by Thomas Leiper, he was made to repeat it; and after I had written it *verbatim*, he subscribed it. You may get Leiper to father the falsehood for you; but it will be a falsehood, whether it be

"below your notice or not. Your character cannot be blotted except by your
 "conduct; and I hope my tongue and pen will never be employed in the base
 "office of injuring the feelings and character of an innocent person. Perhaps
 "I might think it my duty to tear the sheep's clothing from an wolf; but in the
 "present case that is done to my hand; and when you make restitution of the
 "door and padlock I have done with you. I shall therefore take a final
 "leave with returning my wish for your amendment."

No. 2.

These letters were not published; nor was the defamatory matter contained
 in them uttered in the presence of any person. The pursuer raised an action,
 concluding for damages and reparation; and "That the said letters are
 "slandrous and defamatory; and the said John Naismith has been guilty of
 "slander, defamation, and injury against the pursuer, crimes for which he is
 "highly punishable, the more especially where those are committed against a
 "minister of the gospel."

The Lord Ordinary (Cullen) pronounced (Nov. 19, 1806,) the following
 interlocutor: "Finds, that as the present action is chiefly founded on two let-
 "ters the one dated from Hamilton, 19th May 1804, and the other from Hamil-
 "ton, 29th May 1804, both which the defender acknowledges to have been
 "written to him by the pursuer, it is therefore unnecessary to involve the par-
 "ties in any proof; and in respect the said letters are written in the most cruel
 "and intemperate terms, and manifestly tending, without any ground or rea-
 "son, to wound the pursuers mind, and vilify his character, and destroy his
 "usefulness as a minister of the gospel; Finds the letters highly injurious and
 "calumnious, and such as thereby fully entitle the pursuer to reparation;
 "and therefore finds the defender liable to the pursuer in the sum of £50.
 "Sterling of damages and solatium; and farther finds the defender liable in
 "expenses; and allows an account thereof to be given."

The case came by petition and answers before the Inner-House.

Argument of the defender.

The letters libelled on never having been published, but having been sent
 privately to the pursuer himself, do not afford any ground for an action of de-
 famation. A design to injure and defame is indispensable to support an action
 of defamation; and of this design, activity in publishing, and a malicious indus-
 try in circulating the injurious charge, is the evidence which the law requires.
 In the present case the defender has neither been guilty of an intention to de-
 fame, nor of actual defamation; and the letters have reached the public only
 through the means of the pursuer himself.

Argument of the pursuer.

The action concludes for damages arising from an injury *sui generis* as well
 as from defamation. For every wrong there is a remedy; and the law pro-
 vides redress, not only against wounds or violence committed on the body, but
 for those inflicted on the mind, and publicity of commission, however it may

No. 4. aggravate, is as little required to constitute any injury in the one case as in the other. Accordingly damages were awarded for injurious expressions contained in a silent letter, and so conveyed to the person injured, Carter against Crighton, 1778, (not reported.) To any man, but more particularly to a clergyman, the charges of falsehood, felony, and hypocrisy, are injuries of the most painful and aggravated nature.

The Court agreed in opinion with the Lord Ordinary, a very serious injury had been inflicted on the pursuer, whose feelings on the subject of character, from his sacred function, are entitled to the peculiar protection of the law.

On advising a reclaiming petition and answers, (18th May 1808) the Lords adhered.

Lord Ordinary, *Meadowbank.*

Act. *Ad. Gillies.*

Alt. *Jas. Moncrieff.*

Ar. Miller, W. S. and Jo. Granger, W. S. Agents.

F. Clerk.

J. W.

Fac. Coll. No. 40. p. 149.

D E P O S I T U M.

1593. *January 25.* BUCHANANE *against* BUCHANANE.

BUCHANANE ane of the dochteris and airs of umquhile M. Th. Buchanane, and Buchanane hir spouse, for his entres, persewit ane uther Buchanane to exhibit and delyver to hir his father's evidentis, whilk he had, or fraudfully had put away. It was *allegit* be the defender, That his houss being brunt be the hielandmen, he had delyverit the saids evidentis to James Carbraith of —, to the effect they micht be the mare saiffie preservit; and sua thay beand out of his handis lang befor the intenting of this caus, thir persewers could have na action, bot behovit to seik the evidentis fra the said Carbraith. It wes *ansrit*, That sieing this defender had grantit that he anes had the evidentis, he behovit to redelyver thame to thir persewers, wha had na action agains the said Carbraith, bot the said defendar micht persew him as he thocht expedient, alwayes thare action was verie competent agains this defendar, and na uther.—THE LORDS repellit the allegiance, and ordenit this same defendar to exhibit and deliver.

Fol. Dic. v. 1. p. 234. Haddington, MS. v. 1. No 320.

1665. *July.* DOUGLAS *against* BISHOP of CAITHNESS.

THE Bishop of Caithness gives a ticket to the deceast Colonel Richard Douglas, bearing, that he granted the receipt of L. 40 Sterling from him in custody, which he obliged himself to deliver upon demand; which ticket being assigned to Mr Richard Douglas his nephew, he pursues for payment. It was *alleged*, That, in January 1648, the money being depositate in his hand for preservation *non tenetur reddere*, if it hath perished without the fault and fraud of the defender; but so it is, that, in *anno* 1648, he living in Durham, his house was then plundered upon the account of the engagement, and the money also; whereupon he is content to make faith. It was *answered*, That however the ticket

No 1.

A person w
pursued for
the delivery
of a deposit.
It was not
sustained in
deference, that
he had delivered it to
a third party
for safety.

No 2.

A depositary
found entitled
to bring
proof that the
deposit had
been lost
without his
fault.

No 2.

be conceived, as to the granting the receipt in custody, yet truly it was borrowed, and the defender became personally obliged to repay it; and it is known, that the army, for the engagement, marched not Durham way, but the west way in England; and it is unreasonable that the defender should offer to prove his defence by his own oath.

THE LORDS, before answer, ordained the Bishop to give his oath upon the way of consigning the money, or depositing it in his hands; and whether that individual money was plundered at that time.

Gilmour, No 158. p. 112.

1626. *March 18.*E. CASSILS *against* SIMPSON.

No 3.

A nobleman left his Parliament robe with his tailor in a trunk. To render the tailor liable, it was found necessary to prove, that the key of the trunk had been given to him, and that he undertook the custody.

THE Earl of Cassils, as heir to the deceased Master of Cassils, his uncle, pursues George Simpson tailor in Edinburgh, for delivery to him, as heir to the said umquhile Earl, of his Parliament robe, which was within a trunk, and which trunk, having the said robe within the same, was put by the said umquhile Earl's servant, at his command, in the said George's dwelling-house, and was committed to the said George's custody and keeping. This summons was not found relevant, seeing it was not therein libelled, that the key of the trunk, where the said robe lay, was delivered to the defender, and that he took upon him the custody thereof, and to be answerable therefor; without the which had been specially libelled, the LORDS found, that the defender could not be convened, nor be found answerable therefor, albeit the summons bore, that the same was put in his house, and expressly was committed to his custody and keeping. For the LORDS found, that such persons, as was this defender, being common servants to noblemen, as this excipient, who was his tailor, ought not to be answerable for coffers and trunks, and boxes with writs, and such other wares, pertaining to noblemen, which their servants would set in within the dwelling-house of their merchants, or tailors, at the noblemens' coming, or being in Edinburgh; for they would take the same out, and put the same in again, at their own pleasure, as they had occasion to use the same, without the knowledge of the owner of the house, so that it were great iniquity to burden the master of the house with the same thereafter, except that it could be proven, and that it were libelled, that they had meddled with the same, and done any deed prejudicial to the owners therein.

Act. ——— *et Nicolson.*Alt. *Mowat.*Clerk, *Scot.*Fol. Dic. v. 1. p. 234. *Durie, p. 193.*

1683, *March*. RAMSAY and M'GILL *against* LANCELOT CARLETON.

No 4.

FOUND that a depositar might have detention of jewels deposited, till he be paid off debt owing to him by the person that has right to them, whether that person be he that did first deposite them, or one come in his place, albeit compensation is not sustained *in deposito*, to hinder restitution.

Harcarse, (DEPOSITION.) No 413. p. 111.

1685. *January 15*. GEORGE MONTEITH *against* MR HEPBURN.

A BOND of borrowed money granted by Robert Hepburn to for the price of a tenement sold to the granter, being left signed in the hands of Mr James Elphingston the writer, George Monteith, a creditor of the seller, arrested in Mr Hepburn's hand, and got up the bond from Mr Elphingston, upon a ticket to re-deliver it, and pursued a forthcoming of the money.

Alleged for Mr Hepburn; That the bond was left with him till a procuratory of resignation should be delivered, which was wanting.

Answered; Though the seller was obliged to give a sufficient progress, and particularly procuratories, yet the right cannot be quarrelled for want of these, he and his authors having been forty years in possession, especially seeing the defender cannot prove interruption within the forty years. *2do*, The bond being in the pursuer's hand, Mr Elphingston cannot qualify any terms of deposition, unless it be proven by the pursuer's oath, that it was deposited; and it were dangerous to allow havers of writs, especially the writers, to make terms of deposition, when perhaps the writs were lodged in their hands only *custodie causa*.

Replied; Where a writ in favours of a person is delivered to him, or in his possession, which imports delivery, comes forward in the possession of a third party, it cannot be pretended to have been deposited by the debtor, seeing the witnesses insert, or others, may prove the delivery. *2do*, The bond in this case is not proven to have been received from Mr James Elphingston by the pursuer's oath, so as he might adject a quality, but by his note for re-delivery. *3tio*, No clause in the bond is conceived in favours of the pursuer, who has only a consequential interest as creditor to the creditor in the bond.

Duplied; A creditor's creditor may, by arrestment or assignation, repeat all defences competent to the creditor their debtor.

THE LORDS, before answer, ordained the creditor in the bond to depone if it was delivered to him, or only deposited in the writer's hand.

Harcarse, (DEPOSITION.) No 414. p. 111.

No 5.

Whether a bond deposited with the writer was to be presumed delivered to the creditor or not; or what proof?

No 6.

What proof of
deposition?

1685. December. M'INTOSH and DRUM *against* RANDERSTOUN.

It being *alleged* for Humble's interdictors, That they consented to an alienation of lands, upon condition, that they should have power to dispose of the price, and prefer creditors as they thought fit, and that the disposition was deposited in Sir John Cunningham's hands, not to be delivered to Sir William Primrose, until they had destinated the price to what creditors they pleased :

THE LORDS found the deposition only probable *scripto vel juramento*, and not by witnesses instrumentary, or others, in respect the disposition was now in the hands of the buyer, and the price payable to the interdicted seller, and the disposition bore no qualified consent of the interdictors reserving power to apply the price, but a simple consent.

Harcarse, (DEPOSITION.) No. 415. p. III.

No 7.

A person with whom a bond had been deposited, was forced, by warrant of a magistrate, at the instance of a third party, to give it up. He was notwithstanding liable to the person from whom he received it.

1696. November 7.

BRAIDY *against* GOW.

In a concluded cause, Braidy *contra* Gow, for exhibition and delivery of a bond for 1000 merks, granted by Corsehill to her father, and deposited in his hand by him for the behoof of the pursuer, his daughter, providing she accepted it in satisfaction, and gave up her mother's contract of marriage; Gow, in his deposition, acknowledged he had received the said bond from Braidy, to be given up to the pursuer on the terms aforesaid; but that in 1683, he was called before the bailies of Glasgow by one Robertson, an apothecary there, alleging right to the bond, and was summarily incarcerated, and was forced to deliver up the bond to Robertson, on his receipt of the same, ere he could obtain his liberty. The question, at advising of this oath, was, whether this was an intrinsic quality, and if the force was such a legal and warrantable force, as he was bound to obtemper and acquiesce in without seeking farther redress. The Lords considered that a common haver of a writ by the act of sederunt is bound no farther, if he depone that he had it not since the citation, and put it not fraudulently away at any time; but here it was a *depositarius*, who ought to be faithful to his trust; and if he had been forced to give it up by way of a judicial legal process, that it might have exonerated and assoilzied him; but being called for by a summary warrant, and imprisoned, till he gave it up, this cannot be a legal force, nor *metus licitus*, nor done *auctore pratore*; but he ought to have applied for a suspension, that all parties might have debated their rights; which he having neglected, it was not such a *vis major* as could liberate him; else any depositary may by collusion suffer himself to be imprisoned, to afford a pretence to deliver up the writ to the prejudice of them in whose favour the deposition was made; and though a *depositarius* in law *tenetur tantum de dolo et lata culpa*, and there could be no fraud here qualified against Gow,

yet THE LORDS thought he should not have given it up, till he had tried a suspension, else any fide-commissary might evacuate his trust; and therefore THE LORDS found he ought either to deliver up the bond to the pursuer, on her renouncing, *ut supra*, or pay the sums therein contained. *nomine damni*, reserving his recourse of warrandice and relief against Robertson's heir.

Some thought this interlocutor hard, in regard illiterate burghesses think themselves obliged to obey their magistrates, and know not when they proceed legally, and when not, and will not lie in prison till they get a suspension; and the bailie ought rather in that case to be punished for abusing his power; and here *non constabat* she had any right to the bond, it being acknowledged by all to have been conceived in the father's name, and there was an assignation of it to her; and Gow being interrogate, whether the bond bore a substitution to her, he declared he could not tell; and the naked depositions could not convey a right, and so she wanted a title; but if the bond had been extant, that would have been soon cleared. Then Robertson's heirs *alleged* they had the best right to it, having affected it by an arrestment, and obtained a forthcoming. THE LORDS declared they would hear them further on this defence. THE LORDS afterwards granted diligence to recover the bond, and to examine witnesses anent the tenor of it, and sundry particulars, to clear the matter of fact.

Fol. Dic. v. 1. p. 234. Fountainhall, v. 1. p. 732.

1711. January 9.. WATSON against M'KENZIE.

ROBERT WATSON of Muirhouse and his partners sent in 1706, two several barks to the isle of Lewis, with a great quantity of Spanish salt, casks, and other materials for the herring-fishing; but it proving very bad and insufficient that year, they leave the salt and materials with Alexander M'Kenzie of Applecross, then at Stornoway in the Lewis, and take two several receipts from him; the 1st was in these terms, that he shall either re-deliver the salt, or else the equal quality and quantity at the port of Leith, when demanded. The 2d obligation to the other skipper precisely bore, that he should keep the salt therein mentioned as he did his own, and dispose of it as they should order. This lying over till 1709, that the price of salt rose considerably, they require Applecross to deliver back their salt. He having disposed upon it by curing herrings, offered to pay them such current rates as salt gave at the time he received it; which they judging unreasonable, raise a process against him either for the salt itself, or the prices it gave in 1709, when they required it, and for their damages in wanting it so long. *Alleged*, The first ticket contained a plain alternative either to restore the salt, or the like quantity upon demand, which gave Applecross his election either to preserve the individual salt, or use it as he pleased: So from a *contractus depositi* it turns a *mutuum*; and this is clear from

No 8.

A person intrusting with goods deposited, without permission of the owners, was found liable for the market price at the time of requisition.

No 8.

*l. 1. §. 34. D. depositi, Si pecunia apud te ab initio hac lege deposita sit ut si voluisses utereris, priusquam utaris depositi teneberis ; Ergo, after you have made use of it, the actio depositi ceases, and the actio ex mutuo arises ; and he is willing to count so at the price of salt when he received it. As to the second receipt, it is acknowledged to be a mere depositum and custody, and that regularly a depositary cannot make use of the thing entrusted to him without the owner's warrant and allowance, yet there be no rules so general and peremptory but equity suggests exceptions ; and here the very nature of the thing depositate affords one. If they be things quæ servando servari possunt, such as silver-plate, jewels, or the like, the depositary's disposing upon such would be unwarrantable ; but where quantities and fungibles, as wine, salt, &c. which are the subject of commerce, and perish, diminish, and grow worse in keeping, there may be a greater latitude, as containing a tacit mandate to dispose rather than to lose it. Suppose meal were sent from the north to Leith, and it began to corrupt, may it not be sold as long as it is good market stuff? Even so here, salt after some years keeping melts and turns watery, and he is willing to count to them conform to the price of the herrings he cured by that salt, as being the product of the same : And though the market price of salt rose by the union, and the Queen's proclamation for the drawbacks in 1709, yet that event cannot burden him, being a casus incogitatus whereof advantage ought not to be taken : As Huber. ad tit. D. de condict. very well says, non fortuiti et exquisiti casus quibus res justo majore pretio vendi potest inspicienda est, sed æstimatio communis et forensis in foro currens sequenda est : And the learned and ingenious author of lois civiles dans leur ordre naturelle, speaking, de contract de vente distinguishes the nature of damage and interest arising from une suite naturelle et ordinaire, and those that are more remote and unforeseen, and are the effect of some extraordinary event and conjuncture, as truly the rising of the price of the salt here was, and therefore, *l. 21. § 3. D. de act. empt.* reduces the utilitas and profit quæ in emptionem venit to that quæ circa rem ipsam consistit, which excludes extrinsic and adventitious circumstances, which may enhance and raise the value of a commodity to an endless and arbitrary taxation. Answered, Merchants contracts relating to trade must not be left arbitrary, indefinite, and uncertain, which would be destructive of commerce, and ruin credit, by immersing them in processes ; but have fixed and unalterable rules which are not to be perverted by the absurd glosses which lawyer's witty imaginations can suggest ; and of which principles this is one, that the value and estimation of goods must be taken at the time they are demanded and required, otherwise all trading is subverted. Sic Vinnius ad tit. instit. quib. mod. re contrab. obligat. where he determines that æstimatio ineunda est ut valet tempore litiscontestatæ et post moram in reddendo. And it is against natural equity for Applecross lucrari cum nostro damno. THE LORDS found, that as to the salt contained in the first receipt, where he had the power of disposal, he was liable for the price of the*

salt at the time of its delivery, or at the time of his making use of it, or the product of the herrings that were cured with that salt, and gave Mr Watson his election of any of the three ; and for that first ticket, refused to find him liable in the price salt was giving the time of the requisition. But as to the 2d receipt, where there was a clear *depositum*, and no power given him to intromit therewith, THE LORDS found, he having intromitted and disposed on it at his own hand, without any warrant or allowance from the owners, he must be liable for that price salt was giving the time of the requisition, though it was then risen to a very great rate, far above what it gave before ; his intromission being unwarrantable.

Fol. Dic. v. 1. p. 234. Fountainball, v. 2. p. 622.

* * Forbes reports the same case :

THE masters of two vessels, sent with salt and other materials for fishing to the Lewes in anno 1706, finding that the fishing proved unsuccessful that year, deposited their loading in the hands of Alexander M'Kenzie of Applecross living there, who granted two receipts thereof ; in one of which ' he obliged himself to preserve and restore the goods to the skipper and his freighters, or their order, (incident hazards excepted,) or to deliver to them, upon demand, goods of the same quantity and quality at the port of Leith ;' and by the other receipt, ' obliged himself to keep the goods as he would do his own, to be disposed of by the owners order.' Robert Watson and his partners, (to whom the consigned salt and other goods belonged,) failing to call for them the next fishing season, Applecross employed the salt in curing fishes. These owners, in November 1709, required re-delivery, and pursued him either to restore or deliver in the terms of the obligation, or to pay the current prices at the time of requisition, when, by the accident of the Union, salt was at the highest value.

Answered for the defender ; He having undertaken the care and custody of the pursuer's salt and other goods, merely to do them a good office, ought not to be charged for any higher price or value for the salt, than what it could have been sold for at the time it was deposited, or when it was made use of, or what profit was made of it ; and it were a bad return of his kindness to require from him extraordinary prices, that could not be foreseen or thought of at the time of the transaction. His undertaking the custody of the salt could not oblige him to keep it perpetually useless, till it should consume and melt away, but only till the ensuing year's fishing ; and since the pursuers did not call for it then, it being a perishable commodity, the defender acted profitably for them by employing it in curing fishes.

Replied for the pursuer ; By the first ticket, the defender, had he restored the same individual goods, was only to be liable as a depositary, but his making use of them made him liable as *in mutuo*, for the like goods in quantity and quality,

No 8. *L. 1. § 34. ff. Deposit.* And he being obliged to deliver them on demand, the value is to be considered at the time of the demand, *L. 22. ff. de Rebus creditis*. Again, the defender having no power to dispose of the salt by the second receipt, the counteracting his trust by employing it to his own use, made him certainly liable for the current prices at the time he was required to perform his obligation. The pursuers cannot be said to have been *in mora* to demand the salt before it was at the highest value; seeing no time was prefixed for their requiring it; and the defender might have obliged them to receive it, by offering when it was at the lowest rate; and his converting the salt to his own use, hinders him to be looked upon as *negotiorum gestor*.

Duplied for the defender; Persons bargain indeed with hazard of the rising or falling of the value of goods, arising from the usual occurrences by the difference of seasons or trade, which they are supposed to have in view; but *casus incogitatus* happening by supervening laws, or a change of government, is always excepted, *L. 23. § 1. ff. de Actione Empti. Huber. Comment. in Pandect. de Condict. triſti. § 11. Les Loix civiles, Sect. 2. § 18.* of the said title. Yea, suppose the defender had truly borrowed some bushels of foreign salt before the Union, to be restored on demand; it is doubted if he would have been obliged to restore it at the extraordinary value it was raised to by the supervening act of Parliament; this not being like the raising or lowering of money, whereof the entire value depends upon the regulation of law, and any alteration so made therein is not *casus improvisus*, but *circa rem ipsam consistit*.

Triplied for the pursuer; The alteration in the value of goods is more owing to the Parliament's imposing higher and lower duties, than to any accidental difference in the method of commerce. Huber's authority is misapplied; for he in the place cited means only that in stating the estimation of his goods, a single instance is not to be the rule, but a middle estimation to be made, by comparing all the several prices through the country; as the fiars of several shires used to be settled with us. And here the price of salt is not claimed according as it sells in one single place, but according to the general estimation of it. It is well known that debtors in money are liable to perform their obligations in the precise terms thereof, though money be heightened at the term of payment. And albeit our coin, in consequence of the Union, was brought up to the English standard, debtors are obliged to pay according to the reformed value, which is 8 per cent. more than they were liable to before.

THE LORDS found, 'That by the first obligation the defender is bound to make the like quantity and quality of salt furthcoming to the pursuer at the time of the requisition, or the Queen's price, conform to the act of Parliament 1709; and found, the salt being deposited by the second obligation, the defender's intromission therewith without a warrant, is relevant to make him liable for the said price.

Forbes, p. 480.

See APPENDIX.

D E S U E T U D E.

1668. November 12. PATRICK PARK *against* NICOL SOMMERVILLE.

PATRICK PARK pursues a reduction of a bond of 1200 merks Scots, upon these reasons, *first*, Because albeit the bond bears borrowed money, and be in the name of Nicol Sommerville; yet he offers to prove by Nicol's oath, that when he received the bond, it was blank in the creditor's name, and offers to prove by witnesses, that the true cause thereof was, that ——— Sommerville, Nicol's brother, having win all the pursuer's money he had at the cards, he being then distempered with drink, caused him subscribe a blank bond, for filling up what sum he should win from him, and that this sum was filled up in this bond, which he offers to prove by the oath of Nicol's brother that won the money, and the other witnesses insert; so that the cause of the bond being played money, by the act of Parliament 1621, the winner can have no more but 100 merks thereof; *2dly*, Before Nicol's name was filled up, or any diligence or intimation thereof, there was a decreet arbitral betwixt the winner and the pursuer, wherein all sums were discharged; which discharge being by the cedent, to whom the bond was delivered before the filling up of Nicol's name, or intimation thereof, which is in effect an assignation, excludes the assignee.—It was *answered* for the defender, That he opposed the bond, bearing borrowed money, granted in his own name; and though he should acknowledge that the bond was blank in the name, and that thereby his name being filled up, he is in effect an assignee; yet the bond being his writ, the bond cannot be taken away but by writ or oath of party, and not by his cedent's oath, or witnesses insert, unless it were to the cedent's behoof, or without a cause onerous, as the Lords have found by their interlocutor already; *3dly*, Albeit it were acknowledged to be played money, the act of Parliament is in desuetude, and it is now frequēt by persons of all quality to play, and to pay a greater sum than 100 merks; *4thly*, The pursuer who loseth the money, hath no interest by the act of Parliament, because thereby he is appointed to pay the money; but the superplus money more than

No 1.

The act 14th, Parliament 1621, as to playing at cards and dice, found not to be in desuetude.

No. 1.

100 merks, is appointed to belong to the poor ; and the defender shall answer the poor whenever they shall pursue ; but it is *jus tertii* to the loser, who cannot detain the money thereupon ; but whatever was the cause, the defender having received the bond for a cause onerous, and being ignorant that it was for any other cause but true bestowed money, he must be *in tuto* ; otherwise, upon this pretence, any bond may be suspected, and the cedent, after he is denuded by witnesses, may take the same way.

The Lord Advocate did also appear for the poor, and claimed the superplus of the money more than 100 merks, and alleged that the act of Parliament did induce a *vitium reale*, which follows the sum to all singular successors ; and that though ordinarily the cedent's oath or witnesses be not taken against the writ, yet where there is fraud, force, or fault, witnesses are always receiveable, *ex officio* at least, and ought to be in this case, where there is such evidence of fraud, that it is acknowledged the bond was blank in the creditor's name, when Nicol received it, and the filling up was betwixt two brethren, and the debtor dwelling in town, did not ask him what was the cause of the bond ; and that an act of Parliament cannot fall in desuetude by a contrary voluntary custom never allowed by the Lords, but being vitious against so good and so public a law.

THE LORDS found the act of Parliament to stand in vigour, and that the loser was liable upon the same grounds, and therefore ordained the sum to be consigned in the clerk's hands ; and before answer, to whom the sum should be given up, ordained Nicol's oath to be taken when his name was filled, and for what cause.

Fol. Dic. v. 1. p. 235. Stair, v. 1. p. 561.

No. 2.

1693. January 11. KING'S ADVOCATE against MONCRIEFF.

The heritable right of presentation to an office, exercised contrary to the terms of an act of Parliament, was found not null by exception ; and that the question of the desuetude of the statute must be tried in a reduction.

THE LORDS advised the debate, mentioned 3d November last,* between Moncrieff of Reidy and John Adam, craving to be admitted a macer on the King's gift. It was moved by some of the Lords, that there was a competition between two gifts, and each of them objected subreption and obreption against the other, and that there was no way to know if his Majesty proceeded *ex certa scientia et proprio motu*, but by consulting himself, and laying the case before him. Others answered, That this might be a bad preparative, to trouble the King with points of law, and that it would reflect on the secretaries if the King should say, that the one or both were impetrate from him without making him understand the state of the case ; and that wherever there were double gifts, one of the parties would crave to have it remitted to the King. So it was voted, recommend to the King, or decide ; and the last carried ; though all gifts

* See APPENDIX.

and rescripts of princes, either have that clause expressed or implied, *si preces veritate nitentur*, and *relatio ad principem* in dubious cases, is a remedy introduced by law, *Tit. D. et C. de appellat.* Then the next vote was, if the new charter, given by King William to Reidy, was conform to the old rights, which bore only *officium Clavigeri et Serjandi armorum*, whereas the *novodamus* bore *jus præsentandi et nominandi* of a macer before the Lords of Session. The plurality carried, that the new charter was disconform to the old infeftments. Then the third vote was, if the new charter was sufficient to give Reidy a title, right, and interest, to present a macer; and it carried by one vote, viz. six against five, that it gave him a right; though it was urged, that this being only a relative charter, it could convey no more right than what was in the first; and seeing the old charters are not express, and this explication does not quadrate, it can never give him a right to present a macer; and though princes *ex plenitudine potestatis* may give away offices heritably, yet it is a dilapidation and misadministration, and wrongs the Crown; and in process of time, not only the four macers, but many other greater offices may be dismembered from the royal prerogative by sustaining of this.

February 2. 1693.—The King's Advocate's debate against Moncrieff of Reidy's right of presenting one of the macers of Session, mentioned 11th January last, was decided, the Chancellor being present; wherein the LORDS, by several votes, found the following points, *1mo.* That, John Adam, the private party's right being now ended and transacted, that the King's Advocate could not insist for the King's interest, without a special warrant from his Majesty; there being only two cases wherein he could quarrel the subject's right, either by giving his concurrence to actions of one subject against another, or when he had a mandate from the King to that effect; otherwise he might vex all the lieges with processes, and open their charter-chests; and it is so observed by Hope, *Tit. of REDUCTIONS and IMPROBATIONS*; and by Stair the 20th January 1680, Earl of Southesk, *voce KING'S ADVOCATE*.

The *2d* point decided was, that the LORDS could not supersede till June, that either they might acquaint his Majesty, to see if there was any subreption or obreption in Reidy's gift and charter; or at least, that the King's Advocate might apply to see if his Majesty would give him a warrant to quarrel Reidy's gift; for the plurality thought that of dangerous example, and impinging upon the claim of right, to stop justice either by letters to or from the Session; or to insinuate that the King had violated, transgressed or contravened the claim of right, or diminished any branch or part of his prerogative. The *3d* point was, that though the Advocate could not compare without a warrant, yet the Lords, *ex officio*, might consider defences *in jure*, and their relevancy; seeing it is the duty of Judges to supply the omissions, either of parties or their advocates, in points of law, but not *in iis quæ sunt facti*, according to the *tit. C. Ut quæ desunt advocatis judex supplcat.* See Thornton against Keith, *voce PROCESS.*

No 2.

4^{to}, THE LORDS, by a plurality, found Reidy's gift not null on that head, that it gave him the presentation of offices before they were vacant; seeing *beneficium non vacans nequit conferri*; for the LORDS thought a right of patronage and presentation of a minister might lie under the same exception; 5^{to}, They found Reidy's gift not null on the 69th act 1587, that the giving away the King's privileges or casualties in bulk is expressly prohibited; for they thought, the King might lawfully annex the presentation of the macers to the judicatory of the Session for ever; and if so, why not to one man, which, though inconvenient, yet showed the alienation of it from the crown was not unlawful? 6^{to}, It was stated whether Reidy's gift was null upon the 44th act 1455, discharging any offices to be given out in fee and heritage, in any time coming. This was found to be the tenderest point of all; for on the one hand, to find that act of Parliament in desuetude, was to encourage Kings and their Ministers of State to give away and dilapidate all offices, and turn them to be heritable to families or lands: On the other side, to sustain that act as *in viridi observantia* was to alarm the nation, and unhinge all their securities of the heritable offices, which many of them enjoyed. Some were for making a distinction between these that were clad with possession, and this which was only *in adipiscenda possessione*; yet this was still dangerous, for Queensberry, Duke of Gordon, and many others, that had got heritable rights of regalities, which either were not confirmed in Parliament, or were not yet roborate with 40 years possession since their date; and even the old ones might be quarrelled, and the prescription alleged to be interrupted by the edictal citations, the King's revocations, minority, absence when banished, and many other pretences; therefore, to shun all those dangers, the LORDS fell upon this expedient, that this nullity was not receivable by way of exception against Reidy's gift, but only in a reduction, when the King's Advocate, authorized by his Majesty's warrant, insisted in the same; whereupon Reidy's gift was preferred; and John Adam componed with William Innes, who was formerly presented, and having paid 2200 merks to Reidy, he was admitted macer.

Fol. Dic. v. 1. p. 235. Fountainball, v. 1. p. 543. & 553.

1731. June 25. LORD DUN against TOWN of MONTROSE.

No 3.

In a declarator of a right of constabulary, at the instance of Erskine of Dun against the Town of Montrose, it was *objected*, That the said right of constabulary was null by the 44th act, Parliament 1455, declaring, that no office in time to come should be given in fee and heritage.—It was *answered*, The act was gone into desuetude, which the LORDS found. See APPENDIX.

Fol. Dic. v. 1. p. 235.

1749. *February 17.*

ANDERSON and BURGESSES of WICK *against* MAGISTRATES.

IN this case, the maxim that laws respecting public police do not go into desuetude, was argued and founded on by the Court, but not determined.

No 4.

Fol. Dic. v. 3. p. 180. Rem. Dec.

* * * See The particulars, No 8. p. 1842.

See *LAWBURROWS.*

See *APPENDIX.*

DIES INCEPTUS.

1624. *June 26.* DRUMMOND *against* L. CUNNINGHAM-HEAD.

IN an action of suspension betwixt Dummond and Cunningham-head, where-
in Cunningham-head being charged upon his obligation, as cautioner for
Patrick Sommerville, to pay 1000 merks, which being suspended, as being sub-
scribed by him, being then minor, having curators, without their consent;
and this reason being elided by an *answer*, That he was major at the date
and time of the subscribing of the bond; which being admitted, it was
found by the probation, that he wanted 12 or 18 hours, or at the most a
day of his years of majority, when he subscribed the bond foresaid, and for
that inlake they found the bond null; for the LORDS found, That in this, and
the like cases, the account behoved to be made *de momento in momentum*, for he
was born upon the 24th November 1601, and the bond was subscribed upon the
23d November 1622.

THE LORDS also found, That where a renunciation to enter heir is subscrib-
ed by a minor, with consent of his curators, the curators are not restricted
to be bound as cautioners for the minor, or otherwise to become obliged for him
to warrant that deed, and that they are no further obliged, but to consent.

Act. *Nicolson.*

Alt. *Cunninghame.*

Clerk, *Hay.*

Fol. Dic. v. 1. p. 236. Durie, p. 130.

1680. *February 25.* WADDEL *against* SALMOND.

GEORGE WADDEL having married his daughter to George Salmond, and paid
the tocher in her contract, being 1300 merks; the daughter having been mar-
ried upon the 23d of November 1677, and having died upon the 24th of Novem-
ber 1678, at two or three o'clock in the morning, Waddel pursues for repetition of

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No 1.

The Lords
reduced a
bond of cau-
tion signed
by a minor,
though he
wanted only
twelve or
eighteen
hours of ma-
jority.

No 2.

Marriage ha-
ving conti-
nued a full
year and part
of the day af-
ter the year,

No 2.
the tocher
was found
to belong
to the hus-
band.

the tocher, because the marriage was dissolved within year and day.—The defender *alleged* absolvitor, because the marriage stood undissolved for a full year, and part of the day after the year, which the law doth introduce only to make it evident, that the full year is complete, *et in favorabilibus dies cæptus habetur pro completo*; so that the husband's case being more favourable than the father's, he should enjoy the tocher.—It was *answered*, That the terms of the law is, that where the marriage is dissolved within year and day after the solemnization of the marriage, the tocher returns, and the case of the father is more favourable, the daughter being dead without succession; and by the common law, tochers do return in all cases by the dissolution of the marriage.

THE LORDS found, That the marriage having stood undissolved a year, and and a day thereafter, the husband had right to the tocher, albeit that day was not complete.

Fol. Dic. v. 1. p. 235. Stair, v. 2. p. 763.

1680. February 11. *** Fountainhall reports the same case :

GEORGE WADDELL pursues one Salmond for a tocher. It was *alleged*, the marriage had dissolved before year and day expired, in so far as she was married on the 23d of November, and on the 24th of November of the year following she died at two o'clock in the afternoon; and so the year and a day more were not fully expired. *Answered*, In such a favourable case the time must not be counted strictly *de momento in momentum*, but *dies inceptus haberi debet pro completo, ut in favorabilibus interpretari solet*: Yea it may be said this year and day is a kind of prescription, which is not counted *de momento in momentum*, l. 6. *D. de usucapion*. *Answered*, The father was more favourable to get back his money in *solatium* of his daughter and her issue he wanted; and in all other cases it behoved to be a full natural day, as in annual rebellions for liferent escheats, in the *annus deliberandi*, in the possession on base infeftments, by act 105, Parl. 1540; And Craig, l. 2. *Dieg.* 12. speaking *de non-introitu*, gives a good reason for it, *Additur dies ut omnes molestæ quæstiones de anni tempore tollantur*. THE LORDS, on the 25th of February, 'found, that the tocher was due to the husband.' *Nota*. It was only carried by a single vote of an extraordinary Lord, and the President was against it.

1681. June 7.—THE probation led in the action (mentioned February 11th 1680.) between Waddel and Salmond, coming this day to be advised, the LORDS, after much debate, 'found it was enough that both the days of the marriage and of the wife's death were inchoate, though they were not complete, to make up the year and day; and found, seeing she was married on the 23d of November, and died the next year on the same 23d of November, there could

not be two 23ds of November in one year; and therefore she had lived year and day.' But this was a quibble, and no solid ground; for thus it should be construed year and day, though she was married the 23d at night, and died the 23d next year in the morning thereof; though in effect this would want a day of the full year.

In the *triduum* of our Saviour's lying in the grave, neither the day of his suffering, nor of his resurrection were complete days, but only parts of days; yet they enter into the account of the three days. See Doctor Hammond's observations on the 40th verse of the 12th chapter of Matthew, anent Christ's lying three days in the grave, and Grotius's notes on the same passage. See elegantly for this, that *annus inchoatus habetur pro completo*, a debate in D'Avila's History of the Civil wars of France, anno 1563.

Some of the LORDS were of opinion that it ought to be *tempus continuum*, and so counted *de momento in momentum*, that one of the days ought at least to be complete; but the contrary was carried: In this cause, the LORDS also admitted women to be witnesses for proving the time of the wife's death, because they are more commonly present in such cases, than men. See WITNEESS.

Fountainball, v. 1. p. 84. & 140.

1681. January 26.

LADY BANGOUR against Mr WILLIAM HAMILTON Advocate.

THE Lady contending her adjudication of her husband's estate was within year and day of the first, and so behoved to come in *pari passu* with it, alleged the first adjudication was dated 30th day of July 16—, and hers was the 31st of July the following year, which was a day without the year. 'THE LORDS sustained her comprising as within the year and day, and found the year as to this favourable calculation of bringing in creditors together was not only 365 days, but also 24 hours farther, counting *de momento in momento*;' yet in leap year, there is an intercalary day more in February. 'But the LORDS found her adjudication null, because it wanted both a decreet *cognitionis causa*, and a renunciation to be heir.' Though it was answered, finding she was prevented in diligence, she gave in a bill to the Lords, that they might allow her summarily to adjudge, at least to declare her inchoate diligence before the year expired should come in *pari passu* with the prior adjudgers; and which the Lords had granted; but this was only *periculo petentis*, and cannot alter the form established in such cases.

No 3.

In favourable cases year and day counted *de momento in momentum*.

Fountainball, v. 1. p. 127.

1704. November 11. MARGARET BLAIR *against* the TOWN of EDINBURGH.

No 4.

A creditor being required to aliment a prisoner, and no offer of aliment being made, the magistrates set him at liberty on the 10th day at 12 o'clock, alleging that in such favourable cases *dies inceptus habetur pro completo*. The Lords repelled the allegiance.

MARGARET BLAIR pursues the Town of Edinburgh, for suffering Oliver Sinclair, her debtor, to escape out of their tolbooth. *Alleged*, Absolvitor, because by the 32d act, Parliament 1696, it is provided, that if the creditor, ten days after the incarceration, being required, shall not aliment the prisoner, it shall be lawful for the Magistrates to set him at liberty; and *ita est*, this pursuer being required did not aliment, and therefore the Magistrates did liberate him in terms of the act; for they kept him in till the tenth day at 12 o'clock, and no offer of alimentering being made, they were *in bona fide* to let him out, and in such favourable cases *dies inceptus habetur pro completo*. THE LORDS repelled the allegiance, and found the days in the act of Parliament were *tempus continuum*, and to be counted *de momento in momentum*; and they having anticipated some hours, behoved to be liable. *2do*, *Alleged*, That, by this subsidiary action, they could not be decerned for the whole debt in the caption, but only for the sum to which, in booking the prisoner in the tolbooth register, she and the messenger had restricted it, viz. to 210 merks. *Answered*, That, by the common practice, they used not to insert the whole sum for which they were taken, because that made the dues payable to the goodman of the tolbooth, and his under-keepers, very heavy, they exacting a penny for each pound; and therefore, to prevent this, they ordinarily entered them within the debt of the horn-ing and caption to diminish the jailor's fees, and made it about 200 merks; because, by an act of sederunt, 5th February 1675, Magistrates are allowed, where the sum is *within* 200 merks, to set the debtors at liberty in some cases, without putting them to the expense of a charge to set at liberty; and therefore, marking the sum *above* that, whenever they get the charge, they arrest them upon the remanent debt in the caption, and so hinder their liberation. *Replied*, On whatever politic consideration you restrict, we are not concerned; for a Magistrate finding a prisoner entered for 210 merks, if he please he can set him at liberty, and say he will pay the debt himself, and take his hazard; in that case, the creditor-incarcerator could claim no more, neither could he in justice burden him with the rest of the debt contained in the caption, not booked in the tolbooth-records. THE LORDS found the pursuer could crave no more than the restricted sum, but prejudice to her to insist for the superplus of her debt not booked as accords. *3tio*, They craved compensation for the sum of L. 34 Scots she was resting, and whereunto they had acquired right. *Answered*, I must have recompensation upon the remainder of the debt in my caption, not allowed me in this subsidiary action. THE LORDS sustained the re-compensation to take off the compensation craved. Then, *4to*, *alleged*, There was neither penalty nor expenses of process due, *ob pœnam plus petitionis*, having pursued for more than what you had imprisoned him for. *Answered*, You must be liable in expenses, because you put me to an act to prove my requiring the

No 4.

prisoner before the ten days were expired, and I have expended more than all the sum now decerned to me. The LORDS considered this was only a pursuit *ex quasi delicto*, for setting the prisoner at liberty, and that they had a probable ground of mistake and ignorance, on a new statute not yet fully interpreted, to think they might liberate at any time of the tenth day if the creditor did not offer to aliment the prisoner; therefore they assoilzied the Magistrates from expenses; but the LORDS thought the jailor's exaction too high and exorbitant, on the sums due.

Fol. Dic. v. 1. p. 236. Fountainball, v. 2. p. 238.

1740. February 22.

EXECUTORS of the deceased MRS ANNA LEITH *against* the CREDITORS of the deceased WILLIAM FORBES of Tolquhon, her Husband.

No 5.
*Dies inceptus
habetur pro
completo.*

THE said Mrs Anna Leith being provided to an annuity of 20 chalders victual, computing the chalder at 100 merks Scots money, after her husband's decease, and she having lived till the morning of Martinmas 1738, this question occurred betwixt her Executors and her husband's Creditors, which of them was preferable for the same.

THE LORDS found, That the liferentrix having lived to the Martinmas-day, albeit she died on the morning of that day, had right to the term's annuity, which fell due at Martinmas 1738; and therefore preferred the executors of the liferentrix to the creditors.

Fol. Dic. v. 3. p. 180. C. Home, No 148. p. 254.

1762. January 15.

WILLIAM ELLIOT of Arkleton *against* MR JAMES FERGUSSON of Craigdarroch, Advocate.

AT the Michaelmas meeting of the freeholders for the county of Dumfries, upon the 6th of October 1761, William Elliot of Arkleton claimed to be enrolled upon titles altogether unexceptionable. It was however *objected* by Mr Fergusson of Craigdarroch, a freeholder present, That, as the law requires a claim for enrollment to be lodged two calendar months at least before the Michaelmas meeting; so, by two calendar months were meant, two of those months whereof their names are found in the calendar. And that, of consequence, all claims for enrollment upon the 6th of October ought to have been lodged some time in July, that the months of August and September might be free.

No 6.
A claim for inrollment lodged with the sheriff-clerk at four o'clock in the afternoon of the 6th of August, held sufficient, tho' the Michaelmas head-court convened upon the 6th of October, before two o'clock

No 6.

To this it was *answered*: That by two calendar months, nothing could be meant but two months agreeable to the calendar, in opposition to two lunar months; that it was sufficient, if the space of two calendar months intervened, although the number of days were made up by including part of the days of these different months; and that the practice of all Scotland had explained the act of Parliament in that manner.

Mr Fergusson then *objected*: That, at any rate, there wanted two hours to complete two calendar months, in respect that the claim was only left with the sheriff-clerk at four o'clock in the afternoon of the 6th of August; whereas the meeting of freeholders convened upon the 6th of October betwixt mid-day and two afternoon.

To this it was *answered*: That, as the objection was at best extremely critical, so there was no real foundation for it, seeing that, in all cases of legal notice, it was only required, that either the day on which it was given, or the day to which it was given, should be free, but not both; and that, if either the 6th of August or the 6th of October were counted, the full amount of two calendar months would be found.

The freeholders, by a majority of votes, refused to inroll; but, upon a complaint to the Court of Session by Mr Elliot,

'THE LORDS ordered the complainer to be added to the roll.' See MEMBER OF PARLIAMENT.

Act. *W. Nairn.*

Alt. *Dav. Dalrymple.*

A. Wight.

Fol. Dic. v. 3. p. 181. Fac. Col. No 77. p. 171.

See Ogilvie against Mercer, *voce* DEATH-BED, p. 3336.

See Mitchell against Watson, *IBIDEM*, p. 3343.

See APPENDIX.

D I L I G E N C E.

SECT. I.

Diligence prestable by Apprisers.

1625. July 2. KINCAID *against* HALIBURTON.

EVEN after the act 6th, Parl. 1621, an appriser is only liable to account for actual intromissions, and not for what he might have intromitted with; for he is not bound to intromit with any more than he pleases, or to do diligence.

No 1.

Fol. Dic. v. 1. p. 236. Durie.

* * See This case, No 1. p. 314.

* * The like was decided in a case, Tutor of Balmaghie *contra* Maxwell, 16th January 1634, No 2. p. 283.

1629. December 23. JOHN DICKSON *against* YOUNG.

Two comprisers contending which of them should be answered of the money and tacks after the redemption of the lands comprised by them, (for the lands comprised were under reversion, and were redeemed, and the sum whereupon the same was redeemable, was found to come in place of the lands to them, who should be found to have best right by comprising), the first compriser being in possession of the lands before they were redeemed, and the second *alleging*, that the first comprising was extinct by intromission with the duties of the lands, which satisfied the first compriser's sum, which was referred to his oath, and he deponing that the first year of his entry to the lands, the same was waste, and he plenished the same, and reaped no profit at all of the land but was a loser of a part of his own stock by the evil season, and the neighbours' goods which did eat his corns and grass, and that he set the same thereafter for a

No 2.

If an adjudger enter into possession of the lands adjudged, he becomes liable for the rent *qua* tenant, and he has no claim upon the debtor tho' he should be a loser by his possession.

No 2. yearly duty paid by his tenants, to whom he set the same therefor; the other compriser *alleging*, that the first year should be allowed according to the farm which he received, and for the which he set the lands the years thereafter, seeing it was but a casualty, to make gain or disadvantage to any, in the first year of his plenishing. THE LORDS would not allow any thing to the first compriser for the first year, wherein he declared that he was plenisher, and was a loser.

Act. *Stuart & Cheap.*

Alt. *Nicolson & Craig.*

Clerk, *Scot.*

Fol. Dic. v. i. p. 236. Durie, p. 478.

1636. February 11. COLQUHOUN *against* L. BALVIE.

No 3.

In a competition among creditors, he who was preferred *primo loco*, was bound *ad exactissimam diligentiam* for recovery of his payment, that way might be made for the succeeding appraisers.

Two comprisers contending for the mails and duties of the lands comprised, and the L. Balvie, who was brother to the Laird of Luss, (which L. Luss his lands were comprised by both these creditors), being preferred, in respect of his priority of comprising and infestment; the LORDS found, that he ought to do *exactissimam diligentiam*, for recovering of payment from the tenants, and possessors of the lands comprised, whereby he might be satisfied of his debt, for which he had deduced comprising, that after his payment there might be place to the second and subsequent compriser, to recover payment in the second room; and found, that it was not enough to give the prior compriser such preference, that he should not be holden, to do all diligence possible to recover his own satisfaction, and to suffer either the tenants to become bankrupts, or to connive and suffer his brother, the L. Luss the common debtor, to uplift the duties of the lands, and thereby to make his own comprising, and the legal reversion thereof to expire; but that he was holden, as said is, to do *summam diligentiam*, to obtain his own payment, notwithstanding that by the act of Parliament, he *alleged*, he was only liable to count for his actual intromission, and not for that wherewith he might have intromitted; seeing he *alleged*, that the second compriser had an ordinary remedy in law, viz. the benefit of redemption by virtue of the legal, which if he used not, it was his own fault; which allegiance was repelled, and it was found he ought to do all lawful diligence, as said is; and if he did it not, afterwards then when the matter should be again drawn in dispute betwixt the parties, the LORDS would consider thereof; that in case he did not what he might, they would take order, that thereby the second compriser should not be prejudged, by his wilful omission, collusion, or negligence.

Act. *Gilmor.*

Fol. Dic. v. i. p. 236. Durie, p. 794

1639. February 9.

HAMILTON *against* LAUDER.

No 4.

A TENANT who had a current tack, having, after a comprising, deserted his possession ;—found, that the lying waste thereof ought not to prejudice the debtor, but that the compriser ought to be accountable for the same, since he neither laboured nor set it, nor made any intimation to the debtor to take care of it.

Fol. Dic. v. 1. 237. Durie.

* * * See This case, No 41. p. 3391.

1661. December.

SETON *against* ROSEWEL.

No 5.

An appriser in possession was found accountable by a rental, as the lands paid at the time of his entry, without prejudice of just defalcations.

IN a compt and reckoning pursued at the instance of James Seton, being a third compriser of certain houses in Leith, from Mr James Gray, against Anthony Rosewel, who acquired a right to the two first comprising, and was in possession, it was *alleged* by the defender, That he was only comptable for his own and his author's intromission, and not according to the rental produced, bearing what the lands paid at the time of his author's entry thereto ; and that by the act of Parliament 1621, he was tied to no farther ; and alleged also some practiques, annis 1624, and 1625. It was *answered*, That the defender ought to be countable for subsequent or after years, according to the rental, whereby his author meddled the first year ; else, it should be lawful to a compriser, after he has removed the debtor and entered to the possession, to lift, or not lift, what duties he pleased, and consequently to ruin the debtor ; whereas, when he enters to the debtor's lands, he ought *tanquam bonus pater familias*, to make use of the comprised lands, &c. It was *replied*, That before the year 1621, the whole duties belonged to the compriser for his annualrent, had they been ever so great, nor any part counted *in sortem* : and this being restricted by the act, and the compriser having only his annualrent, and the superplus to be allowed in the principal sum ; there the law did oblige the compriser to be comptable for more than he meddled with ; against whom, within the time of the legal, the debtor may use an order of redemption when he will.

THE LORDS found the compriser comptable, according to the rental payable, and paid to the compriser the time of his entry, *but* prejudice of his lawful defences, upon probable reasons, wherefore defalcation ought to be allowed for after years.

Item, In the same cause it being *alleged*, That the second compriser should have allowance of the composition paid to the superior, it was *answered*, That the second comprising, being in effect, only of a legal reversion, it was *frustra*, and unnecessary to seek an infeftment from the superior ; and the compriser

No 5.

cannot seek superfluous expenses off his debtor. It was *replied*, That a second compriser has good reason to seek an infeftment; because, possibly the first infeftment might be reducible upon grounds not known to him, at the instance of a third compriser, as upon payment of the debt, informality, or falsehood; so that to secure himself, the second compriser has good right to seek an infeftment.

THE LORDS found, that the composition should be allowed to the second compriser, providing the same with the composition paid by the first compriser, do not both exceed a year's rent; and if they did not, then to allow *pro tanto*. For they found, that all the superior could have for comprisings, were they ever so many, was but one year's rent. See SUPERIOR and VASSAL.

Fol. Dic. v. 1. p. 236. Gilmour, No 11. p. 10.

* * The same case is reported by Stair, No 7. p. 297.

1671. January 26. CHARLES CASSE against SIR ROBERT CUNNINGHAM.

No 6.

An appriser excluding other creditors in a competition, and entering to possession, is accountable according to the rental, not only for intromission but for omission, both till the apprising be satisfied, and thereafter, for all years of which he uplifts any part.

CHARLES CASSE having sold to Sir Robert Cunningham his right to the lands of Achinhervy in his minority, pursues a reduction of the same disposition upon lesion, and condescends upon his lesion thus, that being infeft for security of 40,000 merks, and in an annualrent effeiring thereto, whereof there were many bygone years annualrent resting, and yet he got only 40,000 merks for all. The defender *alleged*, absolvitor, because the pursuer was satisfied of all his bygone annualrents, in so far as he having appraised for five years' annualrents preceding the apprising, which was in anno 1655, he had entered in possession by virtue of the said apprising of the whole lands of Achinhervy, and so is comptable therefor according to the rental, until he cease to possess the same, which will fully satisfy all his bygones, so that he will have no lesion. *2dly*, He had not only in his person the said apprising, but the infeftment of annualrent, upon which he being preferred in a double-poining, and excluding other parties having also real rights, he is thereby obliged to do diligence, and be comptable not only for what he intromitted with, but for what he ought to have intromitted with. The pursuer *answered*, That he was content to compt for what he had intromitted with, but upon neither ground was he obliged to compt for any further; especially as to his apprising, albeit law and custom had obliged him to compt for the whole rental, till the apprising were satisfied, yet he could not be comptable but for his intromission after he was satisfied, for then he had no title in his person, and it is clear that any intromitter without a title is only liable for his intromission, and all parties having interest might have hindered him to have intromitted after he was satisfied; and albeit a tenant or factor, after the expiring of the tack, or factory, may be comptable for a full rental, yet that is because they have a title *per tacitam relocationem*, or *tacitam commissionem*; but after the extinction of the apprising then no title

remains, and neither is he liable as an annualrenter, even though he did exclude others to do any diligence, because all the effect of an annualrent can only be to distress the ground, or poid the tenants for as much of their rent as is equivalent to the current annualrents, after which any other party having right may lift the superplus, and in this case the annualrenter hath not been preferred as to any bygone rents, but only in time coming, and for his current annualrents, and the bygoners are appointed to be brought in accompt, which was never determined. The defender *answered*, That it were against all reason, that an appriser after he is satisfied, should be in better condition than before he is satisfied; and so as long as he meddles, he must compt by the rental, and it is his proper part, who knows when he is satisfied, to relinquish the possession, which other parties cannot know, till by a long process of compt and reckoning it be determined; and it were most absurd that in the mean time he should continue in possession, and though the rents did in a great part perish, he should not be comptable therefor, but only for what he actually lifted.

THE LORDS found the pursuer as appriser comptable according to the rental, not only for intromission but omission, both till the apprising be satisfied, and thereafter for all years of which he lifted any part; but found not the annualrenter liable for diligence, albeit he did exclude others; but the case came not to be determined, if the annualrenter had, by a personal action, insisted for more years annualrent past, to be preferred to the whole rents, till these bygoners were satisfied, that not being the case here in question.

In this cause it had been formerly *alleged*, that the pursuer, after his majority, had received a part of the price of the lands, in so far as, having in his minority granted a commission to Mr John Smith, one of his curators, to uplift all sums due to him, and he having uplifted a part of the price of the land from the defender, and bonds for the rest, the pursuer, after his majority, had by his discharge produced, received from his curator and factor the said money and bonds, and discharged him thereof, and acknowledged that he and the remanent curators had acted faithfully in all their intromissions, whereby the pursuer hath approven, and homologated the disposition of the land, made by him and his curators, which he now quarrels. The pursuer *Answered*, 1st, That the defence is not relevant, for homologation being a presumed or conjectured consent, not by word or writ, but by deeds done, which import the adhering to the disposition quarrelled, it cannot be inferred by any deeds, but such as can have no other intent or purpose consistent with the rejecting or disapproving the disposition; but here the receiving of the money and bonds from the factor hath a consistency and congruity with this reduction; for the pursuer knowing that he could not be restored against his disposition, unless he did restore what was received by his warrant, might justly take up the same from his factor, that he might be in capacity to consign the same at the bar; as if a minor having bought lands to his lesion, and having wadset a part of the same, he might after his majority redeem the lands wadset by himself, which although it behoved to proceed upon the disposition as his title, yet it being a deed neces-

No 6.

sary to purge the wadset, and reponc the disponer to his own land free thereof, it would never import homologation; or if he had in his minority excambed lands, and wadset a part of the lands he acquired thereby, the redeeming or purging of the wadset after his majority, would import no homologation; so neither can any deed import homologation, which upon any account can be consistent with the annulling of the right quarrelled upon minority. *2dly*, This discharge does bear expressly relation to Mr John Smith's account of intromission subscribed at the same time, and bears that the discharge should be as sufficient as if the account were insert: *Ita est* in the charge of the account, wherein only mention is made of the sums paid by the defender, there is an express reservation, that the account shall be but prejudice to the pursuer to insist in his reduction of the disposition. And as to that clause in the discharge, that the curators and factor had done faithfully, it relates only to their intromission, and not to their omission, and albeit it had borne simply, that they had acted faithfully, that can only import that they had not acted fraudulently, and that they had done for the minor what they conceived best; but does not import that they had acted providently or skilfully, so that the minor may still reduce their deed. The defender *answered*, That the defence was most relevant, being founded upon the pursuer's consent, after his majority; for consent may be adhibited, not only by word or writ, but by any deed importing the consent, as if a minor, giving a bond in his minority, should pay a term's annualrent thereof after his majority; or if a minor, intromitting with his father's moveable heirship, or rents of his lands in his minority, should continue to intromit for one term, or one point further after his majority, in neither case would he be restored; and yet such deeds might be consistent, and might be done to other intents; as if his payment of the annualrent did bear, lest before his reduction he might be distressed, or that he continued his possession, lest the rents or goods might perish to the damage of the party: Yea, though these were expressly mentioned in his discharge, and his reduction were reserved, it would be *protestatio contraria facto*, and would not free him; so neither can the reservation in this account, though it were repeated in the discharge, be sufficient; especially seeing he might have caused the factor consign the money in the clerk's hands, that it might be restored at the discussing of the reduction; so that inconsistent reservations or protestations operate nothing. *3dly*, The charge of this account, wherein only the reservation is mentioned, is a loose sheet of paper, subscribed with another hand than the discharge, and has neither date nor witnesses, and so cannot instruct that this is the very account mentioned in the discharge.

THE LORDS did not determine the point of homologation; but, before answer, ordained the curators and witnesses in the account to be examined upon oath, whether the charge produced be the same that was subscribed, *ab initio*, bearing the said reservation; but they inclined that the reservation would take off the homologation, and would not be void, as *contraria facto*. See HOMOLOGATION.

Fol. Dic. v. 1. p. 236. Stair, v. 1. p. 707.

1671. July 28. MURRAY *against* The EARL of SOUTHESK, and OTHERS.

JAMES MURRAY having right to an apprising of the estate of Sir James Keith of Powburn, led at the instance of Mr Thomas Lundie, pursues thereupon for mails and duties. Compearance was made for the Earl of Southesk and posterior apprisers after year and day, who *alleged*, That by the act of Parliament 1661, betwixt debtor and creditor, it is provided, That the Lords of Session, at the desire of the debtors, may ordain apprisers to restrict their possession to as much as will pay the annualrent, the debtor ratifying their possession; and now the posterior apprisers having appraised *omne jus*, that was in the debtor, craved that the first appriser might restrict himself to his annualrent, and they preferred to the rest of the duties. It was *answered*, That this was a personal and peculiar privilege in favours of the debtor, that he might not unnecessarily be put from his possession, and which he might make use of against all the apprisers, if there were a superplus above the annualrents, and it is upon condition that the debtor ratify the appriser's possession, which is not competent to a posterior appriser, in whose favour this clause was never meant; but there is a special clause for posterior apprisers, being within year and day, to come in *pari passu*; neither can the posterior apprisers have any interest, because the superplus will satisfy the first apprising *pro tanto*.

THE LORDS found the foresaid privilege peculiar to the debtor; but found that the first appriser, seeing he excluded the rest, behoved to compt from this time as if he had possessed the whole.

Fol. Dic. v. 1. p. 236. Stair, v. 1. p. 769.

No 7.

A first appriser, excluding others, is liable in *exactissimam diligentiam*.

1681. January 14.

JOHN MUIR, Writer to the Signet, *against* SHAW of Grimmelt, &c.

No 8.

ONE appriser offers to prove another paid within the legal, in so far as he had taken a decreet for mails and duties against the tenants of the whole lands, and ought to count conform; seeing, by this decreet, others having real rights compearing and competing on their said rights, were excluded from intromission. THE LORDS found John Muir liable to count according to that decreet, seeing others were excluded, except he can instruct he did diligence against the tenants, and could not recover payment.

Fol. Dic. v. 1. p. 237. Fountainball, MS.

* * * The same case is reported by Stair, No 13. p. 301.

No 9.

The Lords found, That an appriser entering in possession, was not accountable for the rental, during the time he was disturbed by the debtor *via facti*, or *via juris*, but so soon as he returned to peaceable possession, he was accountable by a rental.

1681. *January 20.*BURNET *against* BURNET.

UMQUHILE Gavin Burnet writer, having apprised Burnet of Barns' land, above 20 years ago, pursues the tenants for mails and duties. Compearance is made for this Barns, who *alleged*, That this apprising is satisfied by his intromission, and so extinct: Whereupon count and reckoning being appointed, the auditor reported this point, Whether the apprisers should be countable for the whole rental of the lands appraised, whereof his father had taken decreet of mails and duties, and entered in possession of a great part, allowing him deduction of all just defalcations? It was *alleged* for the appriser, That he was only countable for his intromission; and albeit he took decreet, he cannot count since that date, seeing the debtor did hinder him to possess, by lifting the rent from the tenants, and raising suspensions; and seeing the question results in this, Whether the debtor should prove every year's intromission of the appriser, or that the appriser should prove every year's intromission of the debtor, by a special probation, as to every tenant, and as to every term; and albeit the common rule be, that where the appriser once enters in possession, he is presumed to continue the same, unless he prove that the debtor posset, and if there be other apprisers, he is obliged to continue his possession, and to count by the rental; but where the count is only with the debtor, who has interrupted his possession *via juris*, or *via facti*, and that unwarrantably, the debtor ought to prove every year's possession of the appriser, and not he of the debtor.

THE LORDS found, That the appriser entering in possession was not countable for the rental, but only by his several years' intromission, during that time he was disturbed by the debtor *via facti*, or *via juris*, but so soon as he returned to peaceable possession, he was countable by a rental, and presumed to continue his possession, till the same were interrupted by the debtor, allowing by defalcation what he could not recover by diligence.

Fol. Dic. v. 1. p. 237. Stair, v. 2. p. 838.

* * * Fountainhall reports the same case;

A DECLARATOR of the expiration of a legal of a comprising. *Alleged* by the debtor, he was satisfied by the rents of the lands within the legal, by decreet against the tenants. *Replied*, He could not account according to the rental of that decreet, but only for his actual intromissions, because the defender litigiously suspended these decreets, and *via facti*, interrupted and debarred him. THE LORDS found these interruptions *via juris et facti*, being made by the debtor, were sufficient to liberate, except *quoad* actual intromission, ay and while it should be made appear, that he was again peaceably repossessed, but this was only sustained in prejudice of the debtor who interrupted, there being no other creditor compearing.

Fountainhall, MS.

1683. *February.* JOHN MUIR *against* SCHAW of Grimmer.

In a count and reckoning, at the instance of a second appriser against the first, whom he was not within year and day of, the pursuer pretending, that the defender was satisfied, and paid by his intromissions; it was *alleged* for the defender, That, since his entry to possess, the tenants in such and such rooms had not paid all the years' duties, although he had done reasonable diligence against them by horning and denunciation, and had raised caption, though he had not executed the same.

Answered for the pursuer: The defender ought to have ppointed.

Replied: Comprisers are not obliged to ppoint.

Duplied: The defender having, in a competition, excluded the pursuer, he ought to do more than ordinary diligence.

THE LORDS found, That, seeing the defender excluded the pursuer, he ought to have ppointed, unless he allege and prove, that the ppointing would have endangered the laying the lands waste, though in the case of no exclusion, denunciation was a sufficient diligence.

Fol. Dic. v. 1. p. 237. Harcarse, (COMPRISING.) No 287. p. 67.

No 10.
What is sufficient diligence.

SECT. II.

Diligence prestable by Assignees.

1664. BRUCE *against* MORISON.

SIR George Morison of Dairsey made an assignation to umquhile Mr Robert Bruce of Broomhall, to a sum of money contained in a bond granted to him by the Earl of Seaforth, Lord Sinclair, Lairds of Murkle, Lugtoun, and Blackburn; which assignation he did oblige himself to warrant at all hands, and that he should recover thankful payment of the sums assigned, otherways that he should pay to him what sums he should not recover from the debtors. Alexander Bruce, son and heir of Mr Robert, pursues registration of this assignation against Sir George, to the end he may have execution against him for warrandice and payment, payment not being recovered from the debtors. It was *alleged*, absolvitor, because the assignation being dated *anno* 1647, the clause of warrandice and repayment could import no such thing as repayment,

No 11.
An assignation being granted with absolute warrandice in case payment was not obtained, and the assignee having done no diligence to recover payment, the Lords found the granter liable in payment.

No 11. unless diligence had been done *debito tempore*, against the debtors; who, if they have now become irresponsal, it should only prejudice the pursuer, being his own and his father's *mora*, and not the defender's. It was *answered*, That in the assignation, it was not provided that the receiver should do diligence, but that he should recover timeous payment; but so it is that he did not recover timeous payment: Likeas after the granting the assignation, the troubles of the country having grown, and sinsyne the pursuer having used diligence against the Lord Sinclair by horning, caption, &c. he has done more than he was obliged to do, he not being tied to diligence by the assignation.

THE LORDS repelled the allegiance.

Fol. Dic. v. 1. p. 238. Gilmour, No 99. p. 75.

1678. February 7.

STUART against MELVILL.

No 12.

An assignation being granted with absolute warrandice, in case payment should not be obtained, and the assignee having done no diligence, the Lords found he had no claim against the granter of the assignation.

JOHN MELVILL being-debtor to umquhile Henry Stuart, he gives him an assignation to a bond due by Patrick Scot, second son to Langshaw; which assignation bears warrandice at all hands, and that the assignee shall recover payment thereby. Patrick Scot being dead, Henry Stuart as heir to his father, pursues John Melvill for payment of the sum assigned, because he had not recovered payment from Patrick Scot. The defender *alleged*, that by this assignation and clause of warrandice, there was necessarily imported, that the assignee should have done diligence, it bearing expressly, that he should recover payment by the assignation: *Ita est*, Though the debtor, Patrick Scot, lived six years after the assignation, the assignee did no diligence against him; and it cannot be thought, that if the assignee had forborne for 39 years to pursue upon his assignation, that he could have returned upon his cedent, seeing the assignation was not granted in corroboration of any debt, but in satisfaction of a prior debt. The pursuer *answered*, that this clause must import the solvency of the debtor the time of the assignation, and therefore the cedent must prove at least that he was then solvent, and had a visible estate, which might be affected. It was *replied*, That solvency is presumed, unless notour irresponsality were proven, for after so long time the cedent was neither obliged, nor took notice to instruct the condition of his debtor, which should have appeared by the assignee's diligence, whereby if he had incarcerate him, it would have discovered his condition.

THE LORDS found, that this clause imported the solvency of the debtor, but that the same was presumed, unless it were proven that he was a notour Bankrupt, or that the assignee using diligence, did not recover; and if responsality be alleged, allows the cedent to condescend upon any visible estate he had to affect the same.

Fol. Dic. v. 1. p. 238. Stair, v. 2. p. 611.

* * * Fountainhall reports the same case.

No 13.

A recourse upon the absolute warrandice of an assignation, in case payment were not obtained, THE LORDS found this relevant to assoilzie, that Harry did no diligence to recover payment of this debt; for they thought the clause implied a necessity to do diligence, unless the executors would prove the debtor was bankrupt and insolvent the time of granting the assignation; and found this relevant to the defender, that he had then a visible estate. *Nota*, If it had only been absolute warrandice, without these words, 'in case payment be not obtained,' there had been no recourse, though the debtor had been insolvent.

Fountainhall, MS.

1682. February.

HOME against HOME.

SIR Alexander Home of Rentoun having granted a bond of corroboration to George Home of Keams, his uncle, for his payment and relief of certain sums of money that were due to him, and wherein he stood engaged as cautioner for the deceased Lord Rentoun, his brother; and for his farther security, Sir Alexander having disposed to him his hail stock of horse, noul, sheep, and other moveables, upon which there being an instrument of possession by a symbolical tradition, and Keams having disposed and sold a great part of the goods, Sir Alexander pursues Mr Harry Home, to whom Keams had disposed his estate, with the burden of his debts, for count, reckoning, and payment to him of the price of the hail moveables contained in the instrument of possession. *Alleged* for the defender; that the goods being disposed to him only in corroboration, and for his further security for payment of his debts, he cannot be farther liable to count but only for his actual intromissions, in so far as he has actually sold and disposed of the goods. *Answered*, That the disposition being of the hail moveables, and the instrument of possession containing a particular condescence of the number and prices of the moveables, the defender ought to be accountable for all that is contained in the instrument of possession, unless what he can make appear Sir Alexander intromitted with, or that Keams was otherways debarred from the intromission. And albeit Keams's right to the moveables was but a corroborative security, yet seeing it was a simple and absolute disposition as to Sir Alexander, and Keams having actually taken possession of the moveables, and having disposed of a great part of them, he ought to be countable for the hail goods contained in the inventory, unless he can condescend upon a relevant ground why he did not dispose of the hail moveables disposed, as well as of a part. *Replied*, that the disposition being only but a corroborative right, by the very nature of the security, Keams was not farther liable to account but accord-

No 14.

A disposition to moveables, with symbolical possession, being granted in security of a debt, and the creditor intromitting with a part only, the rest remaining in the debtor's possession, he was found liable only for his actual intromissions.

- No 14. ing to his intromission; and albeit there was a symbolical tradition, yet the goods still remained upon the ground, and were kept by Sir Alexander's own herds and servants; so that unless Keams, conform to the disposition, had actually taken away the goods, he cannot be further liable to count but for his actual intromission. THE LORDS found the defender only liable to count for Keams's actual intromission.

Fol. Dic. v. I. p. 238. Sir Patrick Home, MS. v. I. No 158.

- No 15. 1706. June 27. M'MICKEN against KENNEDY.

AN assignation in security taken by a creditor from his debtor to mails and duties, and intimated to the tenants, was found not to oblige the assignee to account for these rents, unless he had debarred the cedent or his creditors from uplifting.

Fol. Dic. v. I. p. 237. Forbes.

* * * See this case, No 62. p. 524.

1709. July 22.

ALEXANDER DUNCAN of Strathmartin against MR ALEXANDER GRAHAM of Methie.

- No 16.

An assignation to a tack, in security of a debt established by an infeftment of annual-rent, was found not to make the assignee possessing by virtue thereof liable to intromit beyond his annualrent, or accountable for more.

IN the ranking of the Creditors of Wintoun of Strathmartin, Alexander Duncan, who had a disposition of the lands from the debtor's heir, objected against an interest produced by Mr Alexander Graham, viz. two heritable bonds with infeftment granted to his author by Wintoun, that the same must be understood satisfied and paid, in so far as he, the common debtor, assigned Alexander Graham's author, for the more secure payment of his money, to a tack of lands paying more duty than his annualrent amounted to, by virtue whereof he entered to the possession, and ought, or is presumed to have continued to uplift the whole rents; unless he can make appear, that he was debarred by another creditor.

Answered for Alexander Graham; His author intromitted with no more than satisfied the annualrent of his money, nor was obliged to intromit with, or count for more of the rents; seeing he debarred no other creditor from access thereto.

THE LORDS found, that the assignee was not liable to intromit beyond his annualrent, nor countable for more. For they distinguished betwixt a voluntary right in security, and a legal right by diligence of apprising or the like.

Fol. Dic. v. p. 238. Forbes, p. 350.

1709. December 27.

ARCHIBALD SMITH, Writer in Edinburgh, *against* JOHN VINT, or WENT,
Shoemaker in Calton.

THE deceased John Vint, cordiner in the Calton, granted bond to William Smith, one of the keepers of the Parliament-house, for the sum of L. 336 : 18s. Scots; and, for his further security and more sure payment thereof, assigned him to several debts due to Vint, partly by ticket, partly by accompt, with this provision, that William Smith being once paid of his debt, and necessary disbursed expenses, the assignation should be void, and he should hold compt for what more he received, than paid him; of the which assigned debts he signed an inventory, and granted receipt of the assignation thereto. About twenty-two years thereafter, Archibald Smith, as assignee by William Smith, pnrnsued John Vint, as representing the said John Vint his father, for payment of the debt in his father's bond.

Alleged for the defender; The debts assigned being prescribed, the pursuer must either impute them in payment, or shew that he has done diligence for recovering thereof in due time; since he did not retrocess the cedent, that he might have been in a capacity to sue for payment. For the assignation and receipt thereof, implied a mandate *utriusque gratia*, which obliged the assignee to diligence required in a mandatary. Yea, his obligement to diligence is expressed by the assigning not only in further security, but also for more sure payment.

Replied for the pursuer; An assignee in security is not liable, unless expressly obliged, to do diligence; because, such an assignation doth not loose the cedent's bond, especially when he never required the assignee to do diligence, or to denude. Nor was he bound to have retrocessed the cedent, though required, without an offer of payment; for no law obligeth a creditor to quit his pledge, unless the cause for which it was given be first satisfied, far less to expend certain money for recovering doubtful debts. 2. The assignation is not properly a mandate, but *pactum adjectum mutuo*, or rather a *pignus*, which obligeth the assignee to take care of the *ipsa corpora* of the writs impignorated, that they perish not through his neglect. He was under no greater tie to pursue for payment (albeit he might have done it) than an arrester is to prosecute a forthcoming, or an adjudger to pursue for mails and duties; for, any inconveniency through the debt's perishing *medio tempore*, may be obviated by the debtor's redeeming the subject assigned or arrested, by payment of the principal debt; and, if he sustain any loss through his failing to do it, *sibi imputet*.

THE LORDS found, That the pursuer was not obliged to do diligence for recovering the debts to which he was assigned in security; and, that these debts, though now prescribed, are not imputable in payment of the debt due by the cedent to the assignee.

No 17.

An assignation to debts due to a tradesman being granted by him to his creditor for security, who suffered the debts to perish, by doing no diligence, The Lords found that the debts perished to the cedent.

Fol. Dic. v. 1. p. 238. Forbes, p. 378.

20 A 2

* * * Fountainhall reports the same case :

No 17.

UMQUHILE John Went, cordiner in Calton, being debtor to William Smith, in L. 336 Scots, he grants him a bond of corroboration for the same in March 1687 ; and for his farther security and more sure payment, he assigns him in the same bond to sundry tickets and unsubscribed accounts exceeding the debt, with this proviso, that William being once paid of his debt, the assignation should be void, and if he recovered more, he should be countable to refund it to Went. Smith, at the same time, signs an inventory of the debts and counts assigned to him, and acknowledges the receipt, but neither of them bears any clause obliging Smith to do diligence. Went, the debtor's son is pursued by Smith on the passive titles to pay the L. 336 Scots, contained in his father's original bond. *Alleged*, Though the assignation do not bear an express obligation to do diligence, yet that is implied in the nature of the transaction, which is a *mandatum utriusque gratia contractum* ; and *quorsum* did I assign you against my debtors, but that you might recover your own payment. Law and reason dictate, that you should not have put them in your pocket, and suffered them to perish by the debtor's death, or prescription ; and, if you had no mind to do diligence and meddle, you should have demanded payment from my father, and retrocessed him, that he might have recovered his own debts, and not have been silent for 30 years, and now, by surprize, pursue me for that which either you got, or might have got, and by your negligence have lost it to us both, which is a degree of *lata culpa quæ dolo æquiparatur* ; and it is like a *depositum*, which must be as diligently gone about as your own affairs. *Answered*, By our law and decisions, an assignation given in security only, was never sustained to oblige the assignee to diligence, unless it were specially so provided, and here the accounts assigned being only drawn out of the shoemaker's count-book, without any written instruction, he was not obliged to pursue so many debtors for petty sums, and throw away certain money for uncertain hope ; and my assignation never being intimated, it did not hinder you to have pursued your own debtors, and taken decreets against them, you having as much to instruct the debt as I ; and, if you had offered payment, I would have retrocessed you into your own place ; and why is the clause of diligence adjected in some assignations, if it were implied *ex juri communi* ; and it is known, that an adjudger is not bound to enter to the possession of the rents of the adjudged lands, except he please. The Lords thought it a hardship, that he had suffered the debts to perish, yet the plurality, from the principles of law, found him not accountable for diligence ; and that the debts perished to the cedent, and no ways to discount off his debt. Some thought, if the debts assigned had been instructed by writ, it might occasion some alteration in the decision.

Fountainhall, v. 2. p. 548.

1715. June 8. ISOBEL ANDERSON *against* CORBET of Hardgray.

HARDGRAY having become cautioner for Captain Anderson in his father's testament as executor; he, for Hardgray's relief, disposes to him, among other things, the lands of Partick, but took his back-bond, in anno 1692; declaring, That the disposition was granted to the effect, that Hardgray might sell the lands, and apply the price for his own relief, and payment of other creditors, and the balance to the Captain's wife, children, &c. The Captain thereafter, with consent of Hardgray, sells the lands to Provost Gibson, and Hardgray became cautioner in the warrandice of the disposition, which, with Gibson's bond for the price, was depositate in a third person's hands, upon these terms, not to be delivered up till Hardgray was relieved of all his former engagements for the Captain. From thence till 1702, Hardgray did not intromit with the rents of the lands, but suffered them to remain in the tenants' hands. But Isabel Anderson, the Captain's heir, having thereafter insisted in a count and reckoning against him upon his foresaid back-bond, charges him, among other things, with the said ten years rent of the lands of Partick, for which he *contended* he was not liable;—because,

1mo, Since the Captain's disposition was only a further security, by the nature of the thing, he ought not to be liable for diligence, except in so far as he had debarred the disponent or any of his creditors from possession, which he had not done. *2do*, Though, by the back-bond, he was obliged to do diligence, yet that obligation must only be to do diligence for the purposes mentioned in the back-bond, which was not to uplift the rents, but to do what he could to sell the lands, and dispose on the price, &c. And that this was solely the party's view, appears, in that very soon thereafter there was a bargain made with Provost Gibson for them, though that sale proved ineffectual by the Captain's own fault in not relieving Hardgray.

Answered for the pursuer; *1mo*, That by the back-bond, Hardgray declares, That the right was granted, that he might sell and dispose upon the lands, uplift sums, &c. and do diligence for effectuating payment, so that the debts due to himself and other creditors might be satisfied: So that having bound himself to diligence, he must be liable for these ten years rent, unless he could say, that after ultimate diligence he was debarred. *2do*, He being, by the back-bond, bound to sell these lands to the best advantage for payment of debts, and pay in the superplus to the disponent, he can never be in *bona fide*, to allow ten years rent to perish. *3tio*, As to the selling to Provost Gibson, and depositing the disposition, *answered*, That Hardgray having been trustee for the Captain, in his whole estate, for securing of creditors, &c. *perinde est*, whether Hardgray granted the disposition, or the Captain, with his consent? For still Hardgray in whose person the right stood, must be reputed the disponent, since the Captain had no right either to the lands or price, except in the terms of Hardgray's back-bond; so that the sale was still Hardgray's deed, and not the Captain's.

No 18.

Found that a person getting a disposition to lands in trust, in order to sell them, and pay himself of what was due to him by the granter; and, not intromitting with the rents of these lands for many years, was not liable for the rents, unless it were instructed, that he entered to possession.

No 18. Besides, that so long as the papers were deposited, they were in effect as not granted, nor could give any right to Provost Gibson, either to possess or intermit with the rents, and therefore could not debar Hardgray from either ; so that he must still be liable for the rents ; this method being far from performing the obligation that lay upon him by his back-bond, viz. to do all possible diligence to sell the lands for payment of debts, &c.

Replied for the defender, That a deposited disposition, and no disposition, greatly differ, at least as to the pursuer ; for, where mutual writs are deposited, not to be recalled at the option of the granters, but put in a third party's hand, till certain articles be performed, they are *quodam modo* delivered, and the *depositor* is considered as a common *sequestrator* for them both ; and, upon performance of the terms of deposition, the writs are as if *retro* delivered of the date ; and thus during the deposition, the subjects are understood sequestrate ; and here, had the Captain implemented the terms of the deposition, the rents would have *retro* belonged to the Provost, and the annualrents of the price to the Captain. Nay, the present particular case is much stronger, for the defender having consented to a sale of the lands, and the terms of deposition being prestable by the Captain himself, he cannot be admitted to plead his own fault, to subject the defender to diligence ; for if he had relieved the defender, the price had come for clearing the defender's engagements, and the disposition would have been effectually delivered, nor was there any obligation upon the defender after the subject was disposed by the Captain's own consent, to do further diligence thereanent.

THE LORDS found Hardgray not liable for the rents, unless it were instructed that he had entered to the possession.

Act. *Elphinston.*

Alt. *Sir John Fergusson.*

Clerk, *Sir James Justice.*

Fol. Dic. v. 1. p. 238. Bruce, No 93. p. III.

SECT. III.

Diligence Prestable by Annualrents.

1662. February 15. LADY MUSWALL, Elder, *against* LADY MUSWALL, Younger.

No 19. IN a contention betwixt the Ladies Muswall, elder and younger, upon two annualrents out of one barony,

THE LORDS ordained the first annualrenter to do diligence within twenty days after each term; that, after that time, the second annualrenter might do diligence; or otherwise, at her option, ordained the lands to be divided conform to the rents, proportionably as the two annualrents. The second annualrent and the first to take her choice.

Fol. Dic. v. 1. p. 238. Stair, v. 1. p. 101.

* * * Gilmour reports the same case :

IN the double poinding pursued by the tenants of Musewel, against the old lady and young lady thereof, both of them being infeft in annualrents furth of the lands; and the tenants and young lady complaining, that they were oppressed by several poindings; and the young lady, when she came to poind, she was always debarred by the old lady;

THE LORDS found, That unless the old lady should poind within twenty days after each term of payment of the tenants' duty, the young lady should poind without any impediment from the old lady. *Gilmour, No 34. p. 25.*

1662. July 26. SIR JOHN AITON *against* ADAM WATT.

ADAM WATT being first infeft in an annualrent out of Whitland's estate, comprised for some of the bygone annualrents; Sir John Aiton being infeft after him in an annualrent of the same lands, *alleges* that Adam hinders him to uplift the duties or poind the ground for his annualrent, and yet lets them ly in the common debtor or tenant's hands until his apprising expire, and therefore *alleges* that Adam Watt ought either to intromit, and do exact diligence, and impute the same in his comprising, or suffer Sir John to do diligence, or at least, that both may do diligence effeising to their sums.

THE LORDS found, That Adam Watt ought to be liable for diligence in time coming, in uplifting the rents to satisfy his apprising; and as to the annualrent, found, That after 40 days after each term in which Adam, as the first annualrenter, might poind the ground, it should be liesom for Sir John, as the second annualrenter, to poind the same, without respect to Adam Watt's prior infeftment, if he did not diligence thereon within 40 days after ilk term.

Fol. Dic. v. 1. p. 238. Stair, v. 1. p. 138.

1671. January 26. CASSE *against* CUNNINGHAM.

AN annualrenter is not liable for diligence farther than for payment of his annualrents, though he exclude others.

Fol. Dic. v. 1. p. 239. Stair.

* * * See This case Sec. 1. b. 1. No 6. p. 3474.

No 19.

No 20.

In a competition of two annualrenters on the same lands, the first was allowed 40 days after each term to do diligence, after which it should be lawful for the second to do diligence.

No 21.

1687. *February.*LADY WHITINGHAM *against* The TENANTS and CREDITORS thereof.

No 22.

Found in conformity with
No 20. p.
3487.

IN an action of poinding of the ground at the instance of the Lady Whitingham and Creditors, it being *alleged* for James Hamilton, one of the creditors, who likewise had an infestment of annualrent, but posterior to the Lady's infestment, That he was prejudged, in so far as she did suffer the common debtor to uplift the rents, and her annualrents running on did exhaust the rent when he came to poind;—THE LORDS decerned in poinding of the ground at the Lady's instance, but declared that in time coming she should be holden to poind the tenants upon the decret, within 40 days after the term at which the rents are payable by the tenants; after which time it shall be liesom to James Hamilton to poind the ground, butt prejudice to the Lady to poind for the bygones of her rent.

Fol. Dic. v. 1. p. 238. Sir P. Home, MS. v. 2. No 897.

1712. *February 21.*THOMAS MONCRIEFF of that Ilk, *against* The Other CREDITORS of THOMAS CAMPBELL Flasher in Edinburgh.

No 23.

A creditor by an heritable bond and infestment, having obtained a decree of mails and duties against the tenants, preferring him to other competing creditors, was found accountable for the rents due by these tenants against whom he obtained the decree; but for his actual intrusions only, after their removal.

THOMAS CAMPBELL in anno 1698, granted to Sir Thomas Moncrieff an heritable bond and infestment in his lands of Towcross, in security of L. 6400 Scots, containing assignation to the mails and duties, but no power to set the lands, remove, out-put or in-put tenants; and Sir Thomas having, in a competition for mails and duties in the 1704, obtained a decret before the Sheriffs of Edinburgh against the tenants, preferring him to Sir James Dick, and other creditors then competing, entered to the possession; but the common debtor, within a short space thereafter, removed the tenants who were decerned to pay Sir Thomas, and set the lands to others, from whom he uplifted the greatest part of the rents. Thomas Moncrieff, now of that Ilk, as deriving right from Sir Thomas, was, in a ranking of Thomas Campbell's creditors, found liable to count for the mails and duties of the lands due by those tenants against whom he obtained the decret of preference; but found accountable only for his actual intrusions after removal of these tenant; because he had no power to set the lands, nor ready execution against the new intrants.

Fol. Dic. v. 1. p. 239. Forbes, p. 592.

The Title DILIGENCE is continued in Vol. IX.

APPENDIX.

PART I.

DILIGENCE

1776. November 14.

AGNES WATSON, and JAMES TAYLOR, her Husband, *against* AGNE MATHIE,
and JAMES WEIR, her Husband.

AFTER the death of James Watson, merchant in Greenock, in 1750, his children, Agnes the pursuer, Andrew, and James, both since dead, made choice of Robert Rae, James M'Neil, and Gabriel Mathie, the defenders' father, as their curators, who did accordingly act in that capacity for 5 years, until James the youngest became of age, but without making up any curatorial inventories. After the curatory expired, an action was brought against the curators to account for their intromissions. With regard to Robert Rae, it appeared, that he had the management of some mercantile concerns, in which the late Mr. Watson had been his partner, and that after the curatory commenced, he had received different payments to account of these concerns. While the action depended against the curators, Mr. Rae died, and his heirs having been in bankrupt circumstances, when the decree was pronounced, the other curators were found liable *singuli in solidum* either for omissions or intromissions. It was insisted, that the defender, as representing her father, must be liable for those sums which had come into Mr. Rae's hands after the curatory commenced. Against this, the defender pleaded

That these sums had been paid to Mr. Rae *privato nomine*, as manager of the mercantile adventure, and not as curator; that when the money had been so placed in his hands, his circumstances were good, and, indeed his credit till the time of his death, which happened many years after the curatory expired, was not questioned, insomuch, that his succession was taken up by his heirs after his death; consequently the pursuer might have got security of this debt from Rae; it would therefore be extremely hard to punish the representatives of the other curators on account of that neglect. The curators had every reason to consider the money as perfectly secure; and it is enough, as Mr. Erskine has said, if curators leave the money of the minors

No. 1.

Co-curators were not found obliged to recover from one of their number funds which had come into his hands *privato nomine*, as he had continued solvent, until the expiry of the curatory.

No. 1. in responsal hands. Ersk. B. 1. Tit. 7. § 24, and 25. Lord Bankton has also said, if the debtors of the pupil are in the same condition upon expiration of the office as they were when it began, the tutor is not to be charged with these debts, whether they be good or bad. Vol. I. p. 171. § 37. Besides, in the present case the eldest of the minors was *majoremnitare proximu*, being 19 years of age when the curatory commenced, and was therefore well able to look after his own affairs. The worst consequences would arise from a decision in the pursuer's favour, as many heirs might be ruined after the death of their predecessor on account of his having undertaken the gratuitous and even pious office of tutor or curator, and consequently no persons would be found to accept of an office attended with so great danger.

Answered: It is not disputed that the sums in question came into the hands of Mr. Rae after the curatory commenced; yet although that money arose from transactions during Mr. Watson's life, of which Rae had the management, he became the debtor of the children, and never had been the debtor of the father on that account; consequently, as that debt did not commence until after the curatory, Mr. Rae must be considered as holding their money from that period as curator for them. Had any other person received that money, and paid it afterward to Rae, he and the rest of the curators *in solidum* would have certainly been liable for such intromission. Where then is the distinction, although Mr. Rae himself received the money as acting partner during the curatory? But whether the money was vested in him *curatorio*, or *privato nomine*, it certainly was the duty of the curators to have those debts which depended only upon open and loose accounts, constituted by bond or bill bearing interest; the omission of which was of itself sufficient to render them liable to the minors. The tutor or curator is liable to that degree of diligence which a good *pater familias* ought to observe; and it has been understood to be their duty to get all debts arising from open accompts liquidated and paid up as soon as possible. There has been no *mora* or neglect on the part of the pursuers, as the action commenced immediately after the curatory expired, which continued still in dependence.—The Lord Ordinary found “the pursuers’ claim to subject the defender for the debts due by the deceased Mr. Robert Rae, not well founded, in respect that these were private debts due by Rae *proprio nomine*, not as curator; and also in respect the pursuer does not offer to prove that Rae at the expiry of the curatory was insolvent.”

Upon a reclaiming petition, however, the Court altered that interlocutor. The defender then presented a petition against this judgment, and the Court, having appointed it to be answered, and the procedure before the inferior Court to be printed, returned to the Lord Ordinary's interlocutor, and refused a petition on the part of the pursuer reclaiming against that judgment.

Lord Ordinary, *Auchinleck*.

Act. *Wight et Craig*.

Alt. *Hay Campbell et Mat. Ross*.

W. W.

